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Supreme Court of the United States

OCTOBER TERM, 1954

No. 480

J. ELROY MCCAW and JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, the Tax Commissioner of the Territory of Hawaii, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, J. Elroy McCaw and John D. Keating, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, dismissing an appeal from the United States District Court for the Territory of Hawaii.

OPINIONS BELOW

The District Court wrote no opinion. However, the District Court's statement to the effect that the District Court had jurisdiction, but refused to exercise the same, appears on pages 466, 467 of the Transcript of Record. The opinion of the Court of Appeals is reported in ..... F.(2d) ....., and is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 30, 1954. An order staying the mandate of the Court of Appeals pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for a Writ of Certiorari, provided such petition was filed in the clerk's office of the Supreme Court of the United States on or before December 20, 1954, was entered on November 12, 1954. The jurisdiction of this court is invoked under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Since the complaint alleged that the Hawaiian tax law was identical with the one struck down by the United States Supreme Court (*Fisher's Blend Stations, Inc., v. State Tax Commission,* 297 U.S. 650, 56 S.Ct. 608, 80 L.ed. 956) and further alleged that broadcasting by its very nature transcended national boundaries and would only submit to a uniform system of ownership and control, and that Congress had preempted the subject matter of radio broadcasting by the Communications Act of 1934, which Act clearly implied that state or territorial legislatures could not legislate upon any part of this subject matter, should not the District or Appellate Court have granted appellants' relief, as a matter of law, since the Motion to Dismiss admitted the truthfulness of such allegations? Especially, when both parties filed motions for summary judgment, thereby admitting there was no dispute in the facts, and a ruling of this Court in a similar case (*Hillsborough v. Cromwell,* 326 U.S. 620, 66 S.Ct. 445, 90 L.ed. 358) held where no other action was pending, and the

appellants' time for appeal had expired, was it not the duty of the District Court to have forthrightly settled this litigation?

2. By admitting jurisdiction existed, did not the District Court abuse its discretionary powers, when by such admission both the District Court and Court of Appeals had to recognize the substantial character of appellants' allegations claiming a valuable Federal right?

3. Should not the Court of Appeals have considered this case as a problem of first instance, as a matter of law, since a Motion to Dismiss and motions for summary judgments had been filed and argued by both parties in the District Court? And, more especially, since the District Court had utilized its discretionary powers, so-called, to abstain from performing its plain judicial duty and thereby coerced the appellants to foresake substantial Federal rights for doubtful and vagrant remedies in a Territorial court where no remedy was actually existent, and questions of serious judicial policy were called to the attention of the Court of Appeals, did not these circumstances compel the Court of Appeals to treat the case as a problem of first instance?

4. Can a "wrong" *ever* become moot as the Court of Appeals stated in dismissing the appeal, where a litigant is relegated to a judicial process of Hawaii where such quaint customs prevail that the winning lawyers write the opinions of the Territorial District Courts? Is this type of "process" due process? Does not the Court of Appeals' refusal to interfere place a

stamp of approval upon that "sort" of process and thus a "wrong" becomes the prevailing law by the cynical passivity of a high Federal Court?

STATUTES INVOLVED

The pertinent provisions of the Communications Act (Title 47 U.S.C.A. Sec. 153, *et seq.*); the Declaratory Judgment Statute (Title 28 U.S.C.A. Sec. 2201); the Territorial Tax Law, involved herein, namely, Chap. 101, Sections 5455, 5535, 5219, Laws of Hawaii, are set forth in Appendix A, *infra,* pages 1A to 5A.

STATEMENT

No suit had been filed by Appellee in any Court for the collection of the tax involved at the time this action was instituted. No action of any kind was pending. Appellants' time for appeal under the tax law involved had expired because for almost two years the Appellee's lawyers, and the local lawyers for Appellants, had been debating academically the constitutionality of the tax law, or lack thereof, among themselves. Finally, it was agreed by the parties that this suit would be initiated in the U. S. District Court for the Territory of Hawaii, in view of the tax law's conflict with the decision of the Supreme Court in the *Fisher's Blend* case (*supra,* and *post*). It is true, jurisdiction cannot be conferred by agreement of the parties, but likewise, it cannot be defeated either if jurisdiction is actually there. In the meantime, while this academic debate was going on, the taxpayers' (appellants') opportunity to appeal to a local board as provided rather vaguely by the law, had expired. It was not designed by either party that such

would happen. The law was new and full of uncertainties. And, while the academic debate was waging, the time for appeal simply tolled. No remedies then existed for appellants in the territorial courts because of the expiration of this right of appeal.

In view of the decision of the Supreme Court of the U. S. in *Hillsborough v. Cromwell,* 326 U.S. 620, 66 S. Ct. 445, 90 L.ed. 358, wherein it was held that a Federal District Court was not required to hold a case until a determination was made by local state courts, the District Court was hard pressed, so to speak, as to how to dispose of the case. A study of the entire Transcript of Record by this Court will throw great light upon the present and justified indignation of the Appellants. The *Cromwell* case, *supra,* was especially important to the Appellants in view of the non-existent and vagrant remedies that were belatedly alleged by Appellee to exist in the territorial courts, but such "remedies" simply *had* to collide with the intellectually indigestible facts that (1) it was the feudal custom for the prevailing counsel to write the "decisions" for the territorial Circuit Courts, (2) the Appellants' right of appeal to any local board under the statute had expired, (3) penalties were not recoverable under Hawaiian Law and thus, (4) no matter whether the tax was legal or illegal, the Territory always made some money by merely being litigious for the penalties (some $25,000.00 as of now) are not recoverable, as hereinafter set forth.

The *Cromwell* case, *supra,* had held that since uncertainty surrounded the New Jersey "Remedy" to protect the taxpayers' federal right, it was a proper exer-

cise of discretion for the federal District Court to proceed to decide the case on its merits in spite of the Johnson Act (Title 28, U.S.C.A., Sec. 1341). In the case at bar, the District Court used the Johnson Act as an excuse to evade its plain judicial duty. The Johnson Act does not apply to the "territories" or even its philosophy, but only to the "states." This court held the statutory three-judge statute (Sec. 2281, Title 28 U.S.C.A.) did not apply to "territories" in *Stainback v. Mo Hock*, 336 U.S. 368, 69 S.Ct. 606. In the *Cromwell* case, *supra*, this court even recognized exceptions for "states" to the application of the Johnson Act. Why, therefore, should a mere "territory" be given a greater sovereignty than New Jersey, one of the "states"?

Issue was joined in the U. S. District Court, wherein an extensive complaint with evidentiary exhibits attached was filed by appellants, and the appellee moved to dismiss with an extensive pleading alleging facts *de hors* the complaint (See Tr. 36 to 113). Respective motions for summary judgment were filed by both parties and the District Court could have ruled on the case as a matter of law (Tr. 113 and 141) and settled this litigation.

At the hearing the lower court stated, p. 467 of Transcript of Record:

> "I am well satisfied that of the causes stated in the complaint this Federal Court *has jurisdiction on a variety of grounds*: Federal question, diversity of citizenship plus three thousand dollars, and the declaratory judgment statute. If wishes controlled, if convenience were a factor, if speed were a factor, I would without hesitation say, 'Let's go on with

the case, the parties are all here, I am reasonably familiar with it, I like working with you folks, I like the case, it presents interesting problems, let's wade into it.' But we all know that those are not legal considerations." (Italics ours)

It was earnestly called to the attention of the District Court that the court was coercing appellants to forego valuable federal rights by its inaction and was compelling appellants to embark upon unknown legal waters where the remedies, if any, were vague, non-existent and repellent; and, that due process of law, as known in our country, could not be obtained in the territorial courts in view of the four cited repellent facts, *supra,* which could not be cured by a lawyer's glibness of tongue or glossed over by the passivity of courts in the past.

There is no provision for *returning* penalties under this tax law in the territorial statutes. Likewise, there is no statutory provision for paying the tax *without the penalties being added thereto.* In fact, the penalty by Hawaiian law, becomes an Hawaiian "realization." The Treasurer of the Territory, if penalties are paid in advance of suit, and as they must be under these fondly described "remedies" by appellee, is prohibited by Secs. 5535 and 5219, Hawaiian Laws, from *repayment* or *refunding.* True, Sec. 1575 of Hawaiian Laws provides that a payment may be made to a "public accountant," not *a court,* but actually to a commercial bank *in the name of the Territorial Collector,* and thus to the Territory itself. That is the way it was paid in the companion case to this case at bar. But, the *later* Secs. 5535 and 5219 govern the *repayment* of such taxes if the tax-

payer wins and one can only recover the "income" and not the penalties, and such are not remedies at all but are legal "snares."

The Hawaiian Treasurer has no right to return the penalties for such become part of the "income" and therefore, if a taxpayer wins, and payment was made under Sec. 1575 Revised Laws of Hawaii, the same "shall become a realization," as set forth in the laws themselves, and the taxpayers' triumph becomes a pyrritic victory.

Sec. 5535, Laws of Hawaii, expressly provides:

> "No taxpayer shall be exempt *from delinquent penalties* by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word *'valuation' shall be deemed to refer to the amount of income."* (Emphasis ours)

Sec. 5219, Laws of Hawaii, expressly provides:

> "The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, *be held by the treasurer in a special deposit* to await the final determination of the appeal. If the final determination *is in whole* or in part *in favor* of the appealing taxpayer, the treasurer shall *repay to him out of such deposit the amount of the tax paid upon the valuation* [*"Income" only,* not the "penalties," as *"valuation"* is described in Sec. 5535 above] *held by the court to have been excessive or non-taxable. The balance,* if any, or the

whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a "realization" under the tax law concerned.*" (Emphasis and note ours)

The "trick" in the above sections is that a "valuation" is described in Sec. 5535 as "income" but when it comes to "refunding" under Sec. 5219, the penalties (now in excess of $25,000.00 in this case) have become a "realization under the tax law concerned." So, win or lose, the Territory cannot help but make some money, so to speak, by merely becoming litigious. These statutes do not provide remedies. They are "a snare," as plaintiff plainly pointed out to the trial court (See Transcript, 271, where the court plainly understood this point).

Again, the District Court stated to appellee (Tr. 313) that a more speedy remedy was in its own court rather than Territorial Courts, and thus unknowingly created another exception to the Johnson Act in favor of appellant, as the Johnson Act requires a "State" remedy to be adequate as well as "speedy":

> "Well, this may not get us anywhere but assuming that it is true that the radio station has only a couple more years to go on its existing license before it applies for a renewal, what I am getting at is, that *this Court* could get you to the Supreme Court faster than the Territorial court could. And you could *collect your tax faster by staying in this Court* than you could by going over to the Territorial court where you would have *one, two, three, four steps to go through* instead of *three over here.*" (Italics ours)

The complaint filed by appellants was extensive and

fully supported by affidavits (See Complaint, Tr. 3 to 30). Appellants' license from the Federal Communications Commission is one for a limited period of time. The conditions precedent to such a grant are set forth in the complaint (Tr. 7 to 29) and such conditions precedent are so many and varied (including *financial, technical* and *character* qualifications), and the regulations of the Federal Communications Commission are so *sensitive,* that the complaint alleged that states and territories could not concern themselves in any way whatsoever with legislation in the field of radio communication, or, with any part of its operations (Tr. 24). Jurisdiction had thus attached to the Federal District Court for the enforcement of a valuable Federal right belonging to the appellants and the rule of discretionary abstention should not have been indulged in to excuse the plain duty of a trial court to hear a justiciable problem of first instance before it, jurisdiction having been conceded by the court.

The District Court toyed with the idea of "retaining jurisdiction" but abandoned it and left the appellants floundering around within a morass of repellant "remedies" in the territorial court (described above). Thus, appellants were forced and coerced into bringing a suit in the Territorial Circuit Court where the Attorney General for Hawaii, as was anticipated, polished up and finally wrote the "decision" for the trial court. The appellee actually "sees" nothing wrong with this "practice." Appellee does not "palm it off" as akin to submitting *Findings* and *Conclusions* or proposed *Instructions,* for Findings and Conclusions were submitted also. Appellee "wrote" this "decision" and this

"practice" (acceptable or nefarious, is for this court to say) is part of the Hawaiian judicial scheme or *"due (?) process."*

In the meantime, appellants appealed this case at bar to the Court of Appeals for the Ninth Circuit. Great expense was incurred to complete a Transcript of Record that would embody all of the allegations of the complaint, the evidentiary exhibits, the appellee's defense, and the entire argument including the colloquy of the District Court so that the Court of Appeals could declare appellants' rights, as a matter of law and as a matter of first instance as was its duty under the circumstances.

However, so much delay was encountered in the Court of Appeals for the Ninth Circuit that the appellants, having been coerced by the inaction of the District Court into paying a substantial amount of money under Sec. 1575, Hawaiian Laws, including penalties which can never be recovered as aforesaid, brought suit to recover such money. Judgment was rendered against the appellants in the local courts, where scant attention was paid to Constitutional questions.

In the meantime, and because of delay in the Court of Appeals, as aforesaid, the appeal of this case (12900 Court of Appeals) which involves different facts and circumstances from the action in the Territorial Court, was consolidated with the appeal to the Court of Appeals (13920 Court of Appeals) of the actions in the Territorial Court (from the Supreme Court of Hawaii which affirmed the lower Territorial Court). Petitions for Certiorari from both decisions are being filed simultaneously herewith, and separately.

The Court of Appeals ruled (see Appendix B) that the wrong committed against the appellants in this case had become "moot." The Court of Appeals paid scant attention to the evidence, or to the record, as shown in the Transcript. In fact, at the argument, the Transcript was derided openly. The exhibits of appellants were not examined at all and at the argument the Court refused to permit their demonstration. On the other hand, in the appeal from the Hawaiian Supreme Court (Cause No. 13920, Court of Appeals), the Court of Appeals was made aware that both parties had solemnly stipulated that a "month's testimony" need not be *printed* but should be sent up in three separate, bound, and legible copies of the reporters' transcript. This effort cost appellant over $2500.00. Yet, this Court of Appeals ruled the "evidence" was "not before it." It was there all right, and pursuant to the rules of that Court and this Court, but it is recognizably quite a chore for some to read 2000 pages of testimony, and the Court of Appeals did not do so. Appellant will cover this travesty in its companion petition filed separately, but simultaneously herewith. The reason for mentioning this now is because the Court of Appeals, between the two records in the two cases, had sufficient "evidence" and grounds to strike down the "practices" complained of for the sake of legal ideals alone, even though it felt it had to hold that tax valid.

To the end that some other hapless litigant, attempting to enforce a Federal right, shall not come abreast of a ruling of a high court that a "wrong" has been made "right" by the use of the word "moot," which has a connotation of cynicism about it, or by the mere pas-

sivity of courts, this petition is being pressed and dedicated—win—lose—or draw—with all the indignation that appellants can muster.

REASONS FOR GRANTING THE WRIT

This case is of vital public significance. Clarification of the law of the case should be forthrightly announced. The few dollars gleaned from broadcasting taxes are not worth the cost of glossing over accepted legal and constitutional principles, and the judicial policies herein assailed.

Opinions of high courts are now in conflict with each other. It is timely and necessary that the Supreme Court of the United States either reaffirm the *Fisher's Blend case,* 297 U.S. 650, 58 S.Ct. 608, or overrule it, for it has been misunderstood and misapplied so many times by those seeking to justify actions of sovereign excess, that it needs reaffirmation more than clarification.

In *Fisher's Blend Stations, Inc. v. State Tax Commission,* 297 U.S. 650, 58 S.Ct. 608, the Court stated on page 610:

> " * * * The essential purposes and indispensible effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission v. Nelson Bond & Mortgage Co.,* 289

U.S. 266, 279, 53 S.Ct. 627, 77 L.Ed. 1166." (Emphasis ours.)

It is noted that the Supreme Court says in the *Fisher's Blend* case, speaking through Mr. Justice Stone in 1936, that "ALL" broadcasting was interstate commerce. The court did not say "a 5,000-watt station"; the court said *"all broadcasting."* Nor did the Supreme Court say anything about State Courts being the determinative agents "of the sphere of commercial value of such broadcasting," as the Hawaiian Supreme Court held. Nor, do appellants adopt the view of the Supreme Court of Hawaii or the Court of Appeals that Mr. Justice Stone was referring to "characteristics" of broadcasting, in the latter part of his opinion, as modifying the earlier part where the Supreme Court ruled that "all" broadcasting was interstate commerce. The *Fisher's Blend* case was reaffirmed and *augmented in Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 58 S.Ct. 546, 82 L.ed. 823, which paradoxically enough is a case relied upon by the appellee. Mr. Justice Stone rendered the opinion of the court also in the *Western Live Stock* case on February 28, 1938, and the case was argued on the theory of "multiple burden" taxation. This case involved a suit by a magazine in New Mexico to prevent a gross receipts tax from being assessed on its distribution of magazines and the magazine publisher (appellant) relied upon the *Fisher's Blend* case. On page 551, in discussing the *Fisher's Blend* case as applied to the *Western Live Stock* case, Mr. Justice Stone, the same judge who rendered the opinion in the *Fisher's Blend* case, speaking for the court, stated:

"* * * In this and other ways the case differs from *Fisher's Blend Station, Inc. v. State Tax Comm'n., supra,* on which appellants rely. There the exaction was a privilege tax laid upon the *occupation of broadcasting,* which the court held was *itself* interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. *If broadcasting could be taxed, so also could reception. Station WBT, Inc. v. Poulnot,* D.C., 46 F.(2d) 671." (Emphasis ours.)

"Great Britain levies an annual license tax on radio receiving apparatus.

"* * * In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed."

Thus the Supreme Court augmented its prior holding and brought the *Fisher's Blend* case into the "multiple burden" rule and a second defense for appellant in this case. There is a noticeable absence of this case's ruling in the State Court rulings relied on by appellees (Arkansas and New Mexico decisions, *post*). We repeat what the court said: *"if broadcasting could be taxed, so also could reception."*

The fact that reception is not taxed does not make the tax as to broadcasting valid. Each is essential to the other. The *mere possibility* that reception could be so taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. At this time, we call attention to the fact that Mr. Justice Stone did NOT cite the *Fisher's Blend* case in the *Western Live Stock* case a case *of limited application,*

or as one confined to a *"stipulated set of facts,"* as does appellee and the Court of Appeals.

All local sales, "services," "activities" and "instrumentalities" of appellant exist solely for the single purpose of projecting its final act—its signal—into space. Without this *final* act, all prior acts and activities of appellant would be useless. Conversely, without the *prior acts* (*i.e.,* sales, services, instrumentalities, etc.), the final act—the projection of appellant's signal into space—could not be accomplished. Thus, as defined by the Communications Act, appellant's activities are all inextricably interstate, regardless of an incidence or so of local activity. All activities of appellants are inseparable from its purpose for existence—namely, to broadcast.

Radio broadcasting consists of *three* indispensible elements, namely, (1) *the transmitter,* (2) the connecting medium, or *the ether,* and (3) *a receiving set.* A loss of any one of the three and you have nothing. Each is indispensible to the other. Thus *the transmitter* (1) is so essentially a part of (2) the connecting medium or *the ether* and (3) *the receiving set,* that you could not have broadcasting without reception or the connecting medium, the ether. All local activities, such as sales, programming, etc., are defined in Section 153, Title 47, U.S.C.A., as *"instrumentalities, facilities, and services incidental to such transmission."*

Congress pre-empted the "financial" aspects of a radio station's existence by affirmatively writing the word "financial" in the statute. The Federal control on the subject was so complete that even had Congress not

used the word "financial," the mere silence of Congress on the subject would have amounted to a prohibition of a state to have considered the "economic" or "financial" aspects of a radio station. Congress affirmatively used the word "financial" and the Federal Communications Commission concerns itself with the "economic" and "financial" aspects of a station, under the Act of Congress. The Commission will only let a station earn 70% of its potential. All other businesses can earn 100%. But not radio. It must *give* 30% of its time to the public interest without charge "in lieu of taxes." That is the only meaning to this hard and fast rule of the Communications Commission. Therefore radio has only 70% of its earning potential left. The Territory seeks to whittle that down. Congress was ahead of the Territory, however, and pre-empted the "financial" aspects of radio. State taxes affect the "economic" and "financial" aspects of a station; therefore a state must give way to a superior Federal control on the subject matter.

The Federal Communications Commission in March, 1946, issued its "Blue Book" (Tr. 10) wherein the Federal Communications Commission declared its jurisdiction over the "Economic Aspects" of a broadcast licensee. "Economic Aspects" include "financial" (Act of Congress includes the word "financial") aspects (See Complaint). The Commission declared that radio could only have an earning potential of 70%. The Territory wants to whittle it down to 67½% and give utterly no service for its "take." If it "gets away" with this much, it will take more. So will other states. Then, radio is back where it was before 1934.

States do not and cannot perform a single service to radio. Territories would do less.

The Supreme Court held in 1940 that "financial qualifications to operate a proposed station" was an important element of "public interest requirements." See *F.C.C. v. Sanders Bros.*, 309 U.S. 470, 60 S.Ct. 693, 84 L.ed. 869. Also, "economic injury," in *Colorado Radio v. F.C.C.* (1941) 118 F.(2d) 24, to a radio broadcasting station licensee was held relevant on the issue of public interest as to whether a license should be granted. To the same effect, see *Heitmeyer v. F.C.C.* (1938) 95 F.2d) 91; *Stuart v. F.C.C.* (1939) 105 F.(2d) 788. See *Saginaw Broadcasting v. F.C.C.* (1938) 96 F. (2d) 554 (Cert. denied, 59 S.Ct. 72) where it was held to be a duty of the F.C.C. to make a finding of adequate financial support as a basis of granting a license. Thus, it is clear that the subject of "finances" has been assumed by the Commission, to the exclusion of a state, especially a Territory of archaic and feudal tendencies where the "winning" lawyers write the "decisions" of its courts, if one can call them judicial "decisions."

However, in spite of the foregoing assumption of control by the Federal Communications Commission of the "Economic Aspects" of radio licenses; and, in spite of laws and decisions of the Federal Courts (*supra* and *post*), the States of Arkansas and New Mexico in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting Co. v. Revenue* (1950) 215 P.(2d) 819, decided flat license fees were valid. Attempt was made in New Mexico to appeal to a Three-Judge Federal Court, but the Federal Court, while holding

radio was interstate commerce, was thwarted by complainants prior action in submitting to state jurisdiction and the Johnson Act (Section 1341, U.S.C.A.) was held to prohibit that court from granting relief. (Contrary—*Cromwell* case, *supra.*)

Mere denials by the Supreme Court of appeals from these decisions are now considered by the Court of Appeals as having overruled the *Fisher's Blend,* the *KVL, NBC,* and *Western Live Stock* cases (*supra* and *post*).

If the Court has doubt that a uniform national system of control over radio, precluding any state taxes whatsoever on the subject matter, was not the intention of Congress, then such a declaration should be made forthrightly. If the "Government does NOT "own" the *ether* above its domain, who does? No tax should ever be allowed to be collected under the guise of innuendo, indirection, confusion, or misinterpretation. Such lead to legal indignity. These "economic aspects" must be cleared up (See *Dumont v. Carroll,* 184 F.(2d) 153). For, if the states can tax at all, the present tax of two and one-half per cent can be raised to ten per cent and thus will be accomplished the second "breakdown" in communications, which Congress intended should never happen in 1934.

The *ether* is unlike the airways, where the owners of land may be held to have some rights to the air over which airplanes fly. (See recent case of *Braniff Airways v. Nebraska,* 347 U.S. 590, 74 S.Ct. 757, where this Court said the C.A.A.'s regulatory powers were *not* bottomed on *ownership* of the air.) However, this indispensable element of broadcasting, namely, the

"ether," has to be *owned* exclusively by the Sovereigns. It has to be. World conferences are held, to which the United States and all nations are signatories, to allocate radio frequencies among themselves to avoid international confusion. Radio waves know no frontiers. The *ether,* or space in which radio signals travel, is incapable of private ownership. However, no such international conferences or agreements are needed for airplanes. The appellants' frequency *must* be filed in Switzerland. That is *not* true of Braniff Airways.

Thus, the case at Bar should have been decided as a matter of law, in favor of appellants. The evidence and exhibits showing the radio spectrum of the world, as allocated by the World Conference, was attached to the complaint. There were no facts capable of dispute in this case as indicated by mutual motions for summary judgment. That is—until appellee saw a chance to create fictional "facts," by hoping for a limited interpretation on the *Fisher's Blend* case (*supra*) through seizing on the point that the "facts" in that case were "stipulated," and ignoring its broader interpretation in the *Western Live Stock* case (*supra*). The Federal Communications Commission is not just interested in "policing" or "regulation" as is the body regulating airlines.

> "The *Communications Act did not create new private rights.*" (Italics ours.)
>
> *Scripps Howard v. F.C.C.,* 316 U.S. 4, 62 S.Ct. 875, 86 L.ed. 1229.
>
> "A licensed broadcasting station must operate in the public interest and is a *trustee* for the public." (Italics ours.)

McIntire v. Penna. Broadcasting, 151 F.(2d) 597.

The Supreme Court has held many times that the question of whether a field has been pre-empted by the Congress to the exclusion of any concern by the states, turns upon the *sensitivity* of the field so pre-empted. The complaint, appellants' exhibits, and all the evidence clearly showed that there is no commerce as sensitive in the modern world as radio. The *ether must* be owned by the public. It is incapable of being owned privately.

The license granted to appellants, marked Exhibit "F," in the complaint (Tr. 12) expressly excludes the licencee from claiming *any property right* in the use of any particular frequency "or of the ether."

For a history of radio broadcasting before the Supreme Court see *National Broadcasting Company v. Federal Communications Commission,* 319 U.S. 190, 63 S.Ct. 997, 87 L.ed. 1344, which held that the Federal Communications Commission was more than "a mere policing organization."

The case of *Dumont Lab. v. Carroll,* 84 F.Supp. 813 (Penna., D.C.) (Aff'md. Cir. Ct. of App., Penna.) 184 F.(2d) 153 (Cert. to this court denied) in striking down censorship of television films by the State of Pennsylvania, held:

> "I am satisfied that in the field of television there has been a plenary exercised by Congress of the power to regulate and a complete occupation of the field, including censorship. Under the comprehensive scheme of regulation established by the Communications Act, the Commission can exercise effective control over the content of programs, and

the fact that this scheme eliminates one particular method of control, namely, censorship in advance of showing, in favor of a less drastic one does not mean that that field is left untouched."

1. (a) This same identical tax (Hawaiian tax) was struck down in the *Fisher's Blend* case, *supra,* and at the same term of this Court, and before the *Fisher's Blend* case, but in the same report the tax was held good as against a telephone company. See *Pac. Tel. & Tel. Co. v. Gallagher,* 306 U.S. 182, 59 S.Ct. 396, 85 L.ed. 595.

Application of cases dealing with taxes upon express companies, railroads, sleeping cars, telegraph companies or the production of electric power are therefore inapplicable to the case at Bar.

This tax is not really a tax upon the "business" of broadcasting. It is a tax upon its "operations." There is a distinction between the two for Congress has preempted the subject mater of a station's "operations," even though the "business" is "private." Yet, the F.C.C. says too, the "business" of a radio station can *only* earn 70% of its potential (*supra*).

There is a substantial federal question involved in *this* petition. In *Beard v. Vinsonhaler,* 338 U.S. 863, where an appeal was dismissed, there was a *license tax* of only a few dollars involved. Obviously, there was no substantial federal question. In this case at Bar there are substantial federal questions, *i.e.,* (1) a tax on "operations" and not just a business tax, (2) a conflict where the territorial courts state that it and other state courts now have the right to determine as to which radio station is engaged in interstate commerce or is not,

depending upon the extent to which its signal is "commercially receivable."

The decision of the Supreme Court of Hawaii (*McCaw v. Fase,* 40 Haw. 121) (Companion case to this case) is now in direct conflict with the regulatory power of the F.C.C. and the prior decisions of this court.

If appellants are not in interstate commerce, as measured by the intensity of its signal, then it follows that the F.C.C. should not concern itself with appellants' business. The Hawaiian Supreme Court held in this case that the Territories and States will determine as to which radio station *is or is not* in interstate commerce. The Court stated:

> "Upon such premise, we hold that neither distance at which emanations are receivable, nor classification for control and regulation, but the sphere of actual commercial value, is the criterion for determination of whether broadcasting is 'intrastate,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation."

In *National Broadcasting Co. v. United States* (*supra*), the Supreme Court took a different view:

> "* * * The Commission's licensing function cannot be discharged, therefore, merely by finding that there *are no technological objections to the granting of a license.* If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? * * *

"* * * The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all of the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers *to promote* and *realize* the vast potentialities of radio. * * *

"* * * These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority. * * *

"* * * In the contex of the developing problems to which it was directed, the Act gave the Commission not niggardly but *expansive* powers. It was given *a comprehensive mandate* to 'encourage the larger and more effective use of radio in the public interest,' if need be, by making 'special regulations applicable to radio stations engaged in chain broadcasting.' " (Italics ours)

The Supreme Court of Hawaii, has in effect found now that state legislatures and state courts should ignore the distance at which emanations are "receivable" and "classification (by the F.C.C.) for control and regulation," and should establish their own "criterion for determining of whether broadcasting is 'intrastate' or 'interstate'." The "advice" of the Supreme Court of the United States in the *National Broadcasting* case (*supra*) can now be dispensed with according to this decision. The Hawaiian Supreme Court has now held that the States (and Territories with the "winning" lawyers writing the decisions, of course)

will handle the technological as well as the other criteria which Congress thought it endowed the F.C.C. to do and of which the Supreme Court of the United States spoke in the *National Broadcasting* case (*supra*).

A few words of the late Mr. Justice Jackson are apropos. In the case of *Northwest Airlines v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950, 88 L.ed. 1283, wherein he concurred with the majority in confining a state tax on personal property of an airline to that state (Later overruled, and turning on the question of "regulation" as opposed to "ownership" of the air), the late Mr. Justice Jackson said:

> "Congress has recognized the National responsibility for regulating air commerce. Federal control is intensive and exclusive. *Planes do not wander about in the sky like vagrant clouds.*" (Italics ours)

Nor are radio signals aimlessly propagated, no matter the wattage. The intensity of the Federal control, and the sensitivity thereof, must now be clarified because of the conflicting opinions of courts.

The Supreme Court augmented and brought the *Fisher's Blend* case (*supra*) into the "multiple burden" rule. There is a noticeable absence of this case's entire philosophy in the decision of the Court of Appeals and the State Court rulings relied on by appellee (Arkansas and New Mexico decisions—*supra*).

We repeat what the Supreme Court said *"if broadcasting could be taxed, so also could reception"* (*Western Live Stock* case, *supra*). This was *not* a limited statement confined to stipulated facts. The fact that reception is not taxed, however, does not make the tax on broadcasting valid. The *mere possibility* that recep-

tion could be taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. For, without one, you could not have the other.

In the case of *Joseph v. Carter and Weekes,* 330 U.S. 422, 67 S.Ct. 815, 91 L.ed. 993 (1947), a gross receipts tax was declared invalid although the possibility of "multiple burden" taxation did not in fact exist. The tax in the *Carter-Weekes* case arose out of a local excise tax law of the City of New York imposing a two per cent excise tax on the business of stevedoring; that is, loading and unloading of ships, in a New York harbor. The City of New York contended the taxable activity, as the appellee in the case at bar contends the activity of radio, was a local activity of loading and unloading of ships, and the taxable event was so completely disjointed from the actual commerce as to characterize it as an intra-state activity. That is exactly the position the appellee in the case at bar takes with relation to broadcasting. Appelle states that broadcasting in Hawaii is purely an intra-teritorial activity and that reception is a mere incident thereto, whether far or near and depending on "the commercial value," not the intensity of the signal, the criteria under which a station is licensed by the F.C.C. This contention is made despite the fact Hawaii is encompassed by the Act (see *supra*); and not withstanding, every taxicab, or small boat that has a transmitter must obtain a F.C.C. license to use and operate such.

The Supreme Court of the United States (1947) disagreed with New York City and held that the activity

of stevedoring was so essentially a part of the commerce itself that the tax was illegal.

In other words, the court reasoned that "if a ship is loaded, it must be unloaded," so to speak. This Court did not say that the "commercial value" (whether loading or unloading scrap steel or diamonds) was the "criteria" for determining whether the activity was *intra-state* or *interstate* commerce, as did the Hawaiian Supreme Court. Broadcasting is akin to "shiploading" —if "intelligence is broadcast, it has to be received," somewhere—far or near, regardless of its value. The court stated:

> " * * * Stevedoring, we conclude, is essentially a part of the commerce itself and, therefore, a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by these gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.' *Freeman v. Hewit, supra*, 329 U.S. 249, 256, 67 S.Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effect of state legislation and its actual or probable consequences. Not only does it follow a line of precedence outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus, in port cities or transportation or handling centers, without dis-

> crimination against outstate as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

2. The District Court should have granted the appellants' Motion for Summary Judgment especially when it was joined in by appellee (Tr. 113-141). A motion to dismiss was filed which admitted the truthfulness of the complaint. The motion to dismiss filed was more than the ordinary Motion to Dismiss. The Motion to Dismiss filed by Appellee was a document which consisted of 47 *printed* pages. It is set forth completely in the Transcript of Record from page 36 to page 113. It consisted of maps, financial statements and every conceivable argument which could be conjured by appellee. Appellee filed a motion for summary judgment. So did the Appellants. The U. S. District Court could have ruled on the subject then and there and it was an abuse of discretion not to do so.

National Broadcasting Company v. Federal Communications Commission (*supra*) (the "chain broadcasting decision") a case of monumental proportions, was decided on a motion for summary judgment. This case at Bar could have been so disposed of. There were no disputed facts. The "facts" belatedly conjured by appellee were brought forth to attempt to distinguish the "stipulated" facts of the *Fisher's Blend* case. In the *Western Live Stock* case (*supra*), where the *Fisher's Blend* case was reaffirmed, with new vigor, nothing was said about "stipulated facts" limiting its application.

The Johnson Act (Section 1341, U.S.C.A.) does not apply to "Territories" any more than the Three Judge Federal Court Statute (28 U.S.C.A., Sections 2281-84). The Supreme Court in *Stainback v. Mo Hock,* 336 U.S. 368, 69 S.Ct. 606, 93 L.ed. 741, held that the Three Judge Statute's reference to "states" did not apply to "Territories." This decision was in 1949. The revised Judicial Code was enacted and signed by the President in June, 1948. If Congress had *intended* that Section 1341 (Johnson Act) should include the word "Territories," Congress would have so enacted such into law as it did just a few sections before 1341, where in Section 1332 at the same session (1948), Congress inserted subsection B of the Diversity Section, stating:

> (B) "The word 'states' as used in this Section, includes the Territories and the District of Columbia." (June 25, 1948)

Thus, the erroneous policy of judicial absention, or discretionary absention, as applied to this case, is met at the outset with negation by this plain expressed intent of Congress. Congress enacted the Declaratory Remedy. Judicial process is intended to effectuate, not congeal Congressional policy. The Declaratory Act is plain.

Under Rule 57, Rules of Civil Procedure, a right to trial by jury is given under the Declaratory Act, and this implies that the Act was to be more than a mere "discretionary" judicial *grant* of the District Courts. On the contrary, plain reading discloses it to be a valuable *right* to a citizen.

Rule 57. Declaratory Judgments.

"The procedure for obtaining a declaratory

judgment pursuant to Title 28, U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

In reason it is difficult to see how this statute and rule can become so emasculated without omission on the part of the District Courts. The Declaratory Statute is neither legal nor equitable, but a Civil action (Section 38.29, Moore's Federal Practice (2nd Edition)). Thus, the only way emasculation and confusion can enuse over the application of this *right* is by an abuse of judicial discretion.

A litigant is entitled to a complete and full hearing—a searching inquiry into his allegations, and to just as much solicitude for his *rights* as the court expresses for the *rights* of an excessive sovereign. All of this is supposed to be known by an experienced trial judge. The District Court stated, in substance, "Jurisdiction obtained; the parties are all here—am familiar with the case, etc. * * * " (Tr. 467). No other action was pending. Why wasn't the case decided? Why were Appellants coerced into a local forum where *the prevailing lawyers write the decisions of the courts?* (Hawaiian Circuit Court Practice—see *supra.*) Why was the expressed law of Hawaii denying refunds of penalties and excessive interest glossed over? Why is a Territory entitled to be protected in its wrongdoing by indirect and

omissive action of the District Courts? This Court did not let it happen in New Jersey (*Cromwell* case, *supra*).

The Congress did not intend, ever, to deprive litigants of their lawful claims or defenses by permitting an abstract personal conception of justice by an individual judge, or a personal conception of a court's power, to be substituted for Federal statutory rights or for rights recognized by rules of substantive law.

It becomes harmful, if rights flowing from Federal statutes or from the Federal statutory scheme for the administration of justice are deliberately ignored or displaced by an assumption of a court's power and duty that could lead only to unjustified expense, and to its consequent sequel, disrespect for all law. In other words, if Congress gives a citizen a right, can a court admit its jurisdiction to award that right but withhold it on a mere caprice of its own? If it can, then Congress has performed a useless function.

No judicial scheme for the administration of justice can be premised upon the transitory predelictions of an individual judge. If so, there can be no integrity in the law. It is for this reason that the term "judicial discretion" is a limited one, and should never be allowed to overpower statutory rights, or those uniform and settled rights flowing from *stare decisis*. The public cannot abide by or adhere to law unless it has uniformity and certainty and just as much concern for the citizen as for an excessive sovereign.

Congress gave the Federal courts power to "declare" rights where issues were confused. It, therefore, becomes a duty for a court to declare rights where juris-

dictional requirements are met. This duty is primary and prescribed and cannot be shrugged off by a capricious adaptation of the term "Judicial Discretion," to the end that the phrase, as practiced upon Appellants by the District Court in Hawaii, is but a legal alchemy whereby there is precipitated a denial of recognized rules of substantive law and Federal rights flowing from a Federal statute.

Excessive concern of the courts for "excessive" sovereigns makes the term "comity," when misapplied as here, a mawkish term in the light of the definition of "judicial review." Failure of a court to do its plain duty, and adopting a policy of indecision by the use of the term "judicial discretion" does not constitute "judicial review," to which the most impoverished citizen is entitled. If so, then "judicial discretion" becomes an unknown, surprising and unstudied legal mixture, precipitating caprice as a synthesis for law and statutory rights. If "judicial discretion" can be used to withhold rights flowing from a Federal statute, or to deny "judicial review" of or a "declaration" on substantial and admitted Federal questions in spite of a prescribed duty to do so, then the power of a District judge becomes uneasily superior to the legislative branch of the government, when equal balance was constitutionally intended.

And, by failure of the Court of Appeals to show other than a cynical passivity to such an abuse of discretion, gives rise to an immediate and thoughtful concern.

The Court of Appeals' decision that this action is "moot" and should be dismissed runs counter to one of

Mr. Justice Frankfurter's statements in the case of *Mullaney v. Anderson,* 342 U.S. 415, 72 S.Ct. 428, 96 L.ed. 458, wherein the court stated:

> "To dismiss the present petition and require the new Plaintiffs to start over in the District Court would entail needless waste and run counter to effective judicial administration * * * "

The withholding of statutory rights, or refusing to decide admitted substantial federal questions, jurisdiction obtaining, under the guise of "judicial abstention," even with the best of intentions, is dangerous and leads but to coercion. It is better to decide the issue, jurisdiction admittedly obtaining, or even if doubt prevailed, than the adoption of a policy of indecision, erroneously based upon a misapplication of a statute or a rule of law (Johnson Act and its philosophy).

By refusing to adhere to the plain prescribed new remedy as afforded by the Declaratory Act, jurisdiction as a Federal court existing as the court admitted, and refusing to function as a court to judicially review excessive acts of a sovereign simply because of an unsound and unwisely conjured policy of "abstention" because a sovereign is involved, a court thereby sloughs off its robes of judicial office and subconsciously becomes a "legislator." But, in doing so, it unwittingly frustrates the statutory scheme for judicial review by shifting to higher courts the District Court's primary and prescribed responsibility for a judicial review of the acts complained of in Appellants' Complaint.

Judicial "legislation" was indulged and utilized here with an undisguised frankness for the solicitude of an excessive territorial sovereign to the detriment of

citizens of the United States—the Appellants. In addition, the Transcript of Record will show an appalling lack of care on the part of the District Court or any thought about adding to Appellant's woes, through its policy of indecision. The principle of "judicial discretion" was expanded beyond the limit of its logic in this case and a defeat of Congressional philosophy and policy, as expressed in the Declaratory Judgment Act, resulted. A policy of solicitude to an excessive sovereign, conveyed through a forthright policy of indecision, cannot be fitted into any category of equitable jurisprudence. There is nothing equitable about it.

"Comity" had nothing to do with this case. There was no "state" involved (*Stainback case, Supra*). There was no "pending" action or actions in the Territorial Court. "Discretion" was misapplied for its application aided an alleged wrongdoer—an excessive sovereign—who, at this stage of the proceedings, admitted its excessiveness by its motion to dismiss. Yet in effect, and by this decision, a wrongdoer, as long as it is a "sovereign" of a sort—even less than a state—can now challenge and overwhelm a citizen of his rights to a judicial review where process is "due process" and not that "sort" of process prevailing in Hawaii.

It was timely for a declaration of appellants' rights by a Federal Court. Two states, Arkansas and New Mexico (in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting v. Revenue* (1950) 215 P.(2d) 819) had ruled diametrically opposite to the *Fishers Blend* case (*supra*) and ignored the Supreme Court's augmentation of its prior holding in the *Western Live Stock* case (*supra*). Confusion prevailed as to

Appellants' rights. Appellants were entitled to a Federal Court ruling on Federal questions, since an appeal was denied by the Supreme Court from one of these State Court decisions, and the territory took the position this denial of an appeal overturned the *Fisher* case (*supra*).

3. The case of *Hillsborough v. Cromwell,* 326 U.S. 620, 66 Sup. Ct. 445, 90 L.ed. 358, is extremely apt to this case. The complaint of appellants alleged that the time for appeal had expired. Appellee does not deny that. In fact appellee belatedly promised to "sue" appellants to "create" an "adequate" remedy "after the fact," so to speak, if the District Court would dismiss the case. The District Court, after the danger of the non-recovery of penalties was pointed out, suggested appellants could become "defendants" (Tr. 232) apparently believing through some fascinating rule of logic, entirely original with the District Court, that such a reallignment of the parties would make up for the inadequacy of the Hawaiian remedies as to the recovery of penalties and interest.

In *Hillsborough v. Cromwell,* 326 U.S. 620, 66 Sup. Ct. 445, the taxpayer's opportunity to appeal to a New Jersey Board of Tax Appeals had expired before the Federal District Court ruled on a motion to dismiss the taxpayers' action for a declaratory judgment that the assessments were void. It was not clear there, as it is clear in the case at bar on the non-recovery of penalties, that the taxpayer had open any adequate remedy for challenging the assessment on local grounds and it was held that the Federal Court was not required to hold

the case until a determination of local law was made by the state courts. A remedy at law cannot be considered as adequate so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. In the case at bar, we did not just challenge the penalties, but the entire tax.

Even though the New Jersey remedy on the local law question was available to the taxpayer, who claimed to have been singled out for discriminating taxation, an uncertainty surrounded the New Jersey remedy to protect the taxpayer's federal right, as here at bar, and a refusal of the Federal Court to dismiss a bill for a declaratory judgment that the assessments were void, was held to be a proper exercise of discretion by the Supreme Court and the Federal District Court was held to have properly proceeded to decide the case on the merits. This was so in spite of the Johnson Act. The Supreme Court held that the uncertainty surrounding the New Jersey remedy to protect the taxpayer's federal rights justified the Federal District Court in proceeding to decide the merits of a taxpayer's bill for declaratory judgment that the New Jersey assessments were void. The Supreme Court held that the fact the court placed its decision on local grounds was not objectionable. Here at bar, Appellants claim that almost $25,000.00 in penalties and interest will be unlawfully "taken" by Hawaii. The Hawaiian statutes say "they will become a realization" (*supra*). There is not even any uncertainty about that Anent mere "uncertainty," the Supreme Court went on to say in this case:

> "In the present cases, it appears that respondent's opportunity to appeal to the State Board of

Tax Appeals had expired even before the District Court ruled on the motion to dismiss and it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds.

"It follows that the bill should not have been dismissed. As stated in *Greene v. Louisville*, 244 U.S. 499, 520, 37 S.Ct. 673, 682, 'a remedy at law cannot be considered adequate so as to prevent equitable relief, unless it covers the entire case made by the bill of equity.'

"Though the availability of a state remedy on the local law question be assumed to exist, so much uncertainty surrounds the New Jersey remedy to protect the taxpayer's federal right that a refusal to dismiss the bill was a proper exercise of discretion. Thus, however, the case may be viewed, the exceptional circumstances which we have noted take it out of the general rule in *Great Lakes Dredge & Dock Co. v. Huffman* (319 U.S. 293, 63 S.Ct. 1070, 87 L.ed. 140). The district court therefore properly proceeded to decide the case on its merits. That it placed its decision on local law grounds is not objectionable. For it is well settled that where the Federal Court has jurisdiction it may pass on the whole case. * * * "

The Supreme Court held also in *Brown v. Western Railway*, 70 Sup. Ct. 105, that a federal right cannot be defeated by forms of local practice and the Supreme Court held it could not accept as final a state court's interpretation of allegations in a complaint asserting a federal right. Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws.

Appellants refer to the *Stainback* case, 336 U.S. 368, 69 Sup. Ct. 606 (*supra*). That case did not turn simply and alone on the question of "protecting" the appellate court's "convenience" and we quote the court as follows:

> " * * * While, of course, great respect is to be paid to the enactments of a territorial legislature by all courts as it is to the adjudications of territorial courts, the *predominant* reason for the enactment of Judicial Code Section 266 does not exist as respects territories. This reason was a Congressional purpose to avoid unnecessary interference with the laws of a sovereign state. In our dual system of Government, *the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory.* A territory is subject to Congressional regulation." (Italics ours)

The foregoing decision does not in any way detract from the powers and duties of a Federal Court in Hawaii as compared with the constitutional Federal Courts on the mainland. But, it did not give the Federal Court in Hawaii the right to "legislate" either, or to avoid his plain judicial duty. Congress simply did not write the word "Territories" into the Three-Judge Court Act or into Section 1341, the Johnson Act. The courts cannot "legislate" those words into Congressional enactments. The Congress only can do that.

The time had expired for any local remedy, even if the Johnson Act did apply, prior to appellants going into the District Court. There was no provision in the Hawaiia law for the recovery of penalties in case the

law was held invalid even if the money were paid to a local "public accountant" as insisted by appellee. On the contrary, the statute (*supra*) provides only the "income" can be returned, and not the penalties, which become an Hawaiian "realization." This is an unconstitutional "taking." If the law were held invalid, the "income" paid could be recoverable, but the penalties are confiscated in violation of plaintiffs' constitutional rights. No provision exists for their return. In fact, Sections 5535 and 5219 Hawaii law (*supra* and *post*) remove any "uncertainty" and say they shall be "realizations" or mere "prizes," as you will, of the Territory. No appeal could be taken through the local courts for the recovery of these penalties.

The case of *Georgia Railroad and Banking v. Redwine,* 342 U.S. 299, 72 S.Ct. 321, 96 L.ed. 325 holds that an adequate state remedy existing as to only a portion of state taxes, the assessment and collection of which was sought to be enjoined in a Federal District Court, does not dispossess the Federal Court of jurisdiction over *the entire controversy.* Here, the inadequacy of a remedy for the return of the penalties was in question. That alone afforded Federal jurisdiction, and the appellants are entitled to have their case tried other than by piecemeal. The *Georgia Banking* case, *supra,* cited the following note:

> "An adequate remedy as to only a portion of the taxes in controversy does not deprive the Federal Court of jurisdiction over the entire controversy." *Greene v. Louisville I. R. Co.,* 244 U.S. 499, 72 S.Ct. 321, 96 L.ed. 335; *Hillsborough v. Cromwell, supra.*

4. No suit was pending in the Territory between these parties at the time this action was initiated.

All of the essential elements of jurisdiction were present. The issues were plainly ones of law by virtue of both parties filing Motions for Summary Judgment. The ruling of the Supreme Court in *National Broadcasting v. U.S.*, 319 U.S. 190, 63 S.Ct. 997, not only made the controversy one of law, but a justiciable case because of conflict and confusion over the law. There were then and now decisions by high Federal Courts in conflict with high State Courts' decisions that called for a Declaration of Appellants' Rights under the Federal Declaratory Statute.

The Court of Appeals held that the wrong committed against the appellants was now "moot." It was pointed out in the argument before the Court of Appeals that the repellent "remedies" in the territorial courts, such as penalties becoming Hawaiian "realizations," and the custom of the "prevailing lawyers" writing the decisions of the local territorial courts was offensive and a denial of due process, and that a denial of due process could never become "moot." The Court of Appeals attempted to pass it off as akin to lawyers submitting findings of fact and conclusions of law. One of them, however (Judge Orr) stated there was a difference.

The question of judicial policy and lack of process alone, engendered by this unique and quaint practice of "winning lawyers" writing the opinions of judges, is sufficient to justify a review of this case. That infamous practice will never become "moot" to the appellants and many other citizens.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be granted. The case presents issues which are not only important in the future administration of the Federal Communications Act, but to the states, and to the radio industry, and the case is also of pressing significance to the extent of future governmental rights and duties over the vast "properties" in the ether, the extent of which is not yet known.

Respectfully submitted,

KENNETH DAVIS
Attorney for Petitioners.

DAVID INGMAN
of Counsel.

APPENDIX A

STATUTORY PROVISIONS

Title 47, U.S.C.A., Sec. 153, Subsection B:

"Section 153. Definitions.

"For the purposes of this chapter, unless the context otherwise requires—

"(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalies, facilities, apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

"(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all *instrumentalities, facilities,* apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) *incidental* to such transmission.

"(d) 'Transmission of energy by radio' or *'radio transmission of energy'* includes both such transmission and all instrumentalities, facilities, *and services incidental* to such transmission.

"(k) 'Radio station' or 'station' means a station equipped to engage in radio communication or *radio transmission of energy.*" (Italics ours)

Title 47, U.S.C.A. Sec. 301:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States

over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof, by persons* for limited period of time, under licenses granted by Federal authority, and no such license shall be construed to create *any right,* beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

Title 47, U.S.C.A. Section 303:

"'Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"'(a) Classify radio stations;

"'(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

"'(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * *;

"'(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

"'(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * *

"'(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * *"

DECLARATORY ACT

Title 28, U.S.C.A. Sec. 2201, Creation of Remedy:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief

is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, Sec. 111, 63 Stat. 105."

FEDERAL RULES OF CIVIL PROCEDURE

Rule 57, Federal Rules of Civil Procedure, Declaratory Judgments:

"The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

HAWAIIAN LAWS INVOLVED

"Sec. 5455, Hawaiian Laws, Imposition of Tax. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

* * *

"D. Tax upon theaters, amusements, radio broadcasting stations, etc. Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are

offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business."

Section 5535, Laws of Hawaii:

"No taxpayer shall be exempt from delinquent *penalties* by reason of having made an *appeal on* his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word '*valuation' shall be deemed to refer to the amount of income.*" (Law 1945) (Italics ours)

Section 5219, Laws of Hawaii:

"The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, be held by the treasurer in a special deposit to await the final determination of the appeal. If the final determination is in whole or in part in favor of the appealing taxpayer, the treasurer shall repay to him out of such deposit the amount of the tax paid upon the *valuation* held by the court to have been *excessive or non-taxable. The balance,* if any, or the whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a realization under the tax law concerned.*" (Italics ours)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*,

v.

EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.

No. 12,900

Appeal from the United States District Court for the District of Hawaii.

Before: DENMAN and ORR, Circuit Judges
YANKWICH, District Judge

On November 15, 1950, the appellants J. Elroy McCaw and John D. Keating began an action in the United States District Court for the Territory of Hawaii, against Torkel Westly, the then Tax Commissioner of the Territory of Hawaii. McCaw is a citizen and resident of the State of Washington. Keating is a citizen and resident of the State of Oregon. Since the commencement of the action, Earl W. Fase has succeeded Westly as Tax Commissioner.

In their complaint, the appellants attacked the validity and sought to enjoin the enforcement of a tax law, §5455(d) of Chapter 101 of the Revised Laws of Hawaii, 1945. The challenge was based upon the ground that the law was unconstitutional as applied to the appellants, who are operating a radio station, KPOA, under a temporary license issued by the Federal Communications Commission, in that the tax on the gross

receipts of the station was unconstitutional as a burden on commerce and an attempt to regulate and control an instrumentality of interstate commerce. Jurisdiction was invoked under 28 U.S.C. §§1331, 1332 and 1337. Declaration of rights was also sought under 28 U.S.C. §2201.

The appellee filed a motion to dismiss and a motion for summary judgment. These were heard together with the appellants' motion for a temporary injunction. On February 5, 1951, the Court entered its order dismissing the action without prejudice. In part it read:

> "The Court having laid aside the various motions of the parties and raised on its own the question of whether or not it had jurisdiction and if so, should it as a matter of judicial discretion exercise the same, and
>
> "The parties respectively having addressed themselves by way of argument to the questions raised by the Court, and
>
> "The Court being fully advised, for the reasons stated in its oral ruling dated January 24, 1951, it holds that although it has jurisdiction, in the exercise of sound judicial discretion it should not use such jurisdiction here, and accordingly."

In the oral ruling dated January 24, 1951, to which reference was made, the court stated, in effect, that while he had jurisdiction, he should not exercise it by reason of comity to the Territorial courts:

> "Basically the problem is this: Having jurisdiction, should this Court in its judicial discretion exercise it? I believe not, and for the following reasons: There is an excellent, long-standing adhered to policy, recently amplified by the Johnson Act,

which in effect says that contested tax statutes should be litigated in the courts of the sovereign which enacted the statute. In this case a state statute is involved, Territorial statute to be more exact. But the policy is that Federal courts will keep hands off of those situations and allow the state or Territorial courts to examine the validity or invalidity of their tax statutes. And this is but an expression of the interrelationship of two sovereigns under our Federal system of government. And it is a wise and sound policy as exemplified by the various cases with which you are all familiar, as well as myself. In other words, the Congress and the courts themselves have recognized that the Federal Government in none of its branches should interfere with taxation programs of the state and that all litigations relating to the validity of state taxation should be conducted in the state courts, the judges of which are likewise bound by the Constitution and laws of the United States. * * * And so that whether the Johnson Act as such can be said to apply—and I think it does for I think the word 'state' there should be broadly interpreted—but regardless, the policy exists quite apart from the Johnson Act, and most certainly the judicial discretion exists quite apart from either the Johnson Act or the policy.

"And all things being considered I do not think that judicial discretion in this instance should be exercised in favor of retaining and exercising jurisdiction because, as I see it here, the presumption is that the Territorial remedy provided to an aggrieved taxpayer is plain, adequate, speedy, clear and complete both in point of law and in point of equity."

In dismissing the action the trial court had in mind

the principle declared in such cases as *Matthews v. Rodgers,* 1932, 284 U.S. 521; *Great Lakes Dredge & Lock Co. v. Huffman,* 1943, 319 U.S. 293, 300-301; *Hillsborough v. Cromwell,* 1946, 326 U.S. 620; that suits to prevent the enforcement of a tax statute will not be entertained by the Federal courts when the statute has provided for payment under protest to be followed by an action in the State courts to recover the amount so paid.

This is an appeal from the judgment of dismissal. After the entry of this judgment, the appellants on March 21, 1951, paid the tax under protest. On May 3, 1951, they filed an action in the Circuit Court, First Judicial Circuit, pursuant to Section 1575 of the Revised Laws of Hawaii to recover the sum of $7,637.33 paid under protest. In the complaint they challenged the constitutionality of the statute upon the same grounds urged in the action from which this appeal is taken. Issue was joined by the Tax Commissioner. The case was tried without a jury. The territorial court, on January 28, 1953, made its finding holding the statute valid as applying only to the gross income of the business done by the appellants' radio station in the territory.

On a writ of error the judgment of the Circuit Court was affirmed by the Supreme Court for the Territory of Hawaii on June 8, 1953. *McCaw v. Fase,* 1954, 40 Haw. 121. An appeal was taken to this court on the same day. (26 U.S.C., §1293).

In an opinion filed today the judgment of the Supreme Court of the Territory of Hawaii is affirmed and

the contentions of unconstitutionality of the statute are rejected. So, whether the United States District Court in the present case was or was not justified in declining jurisdiction upon the grounds stated, or any other grounds, or whether the Johnson Act (28 U.S.C., §1341) does or does not apply to the Territory of Hawaii, is no longer a justiciable question,—for the entire appeal has become moot.

The appeal is therefore dismissed.

(Endorsed:) Opinion. Filed Oct. 30, 1954.

PAUL P. O'BRIEN, Clerk.

No. 480

ADDENDA TO APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*,
vs.
EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.
No. 12,900

APPEAL from the District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

(ENDORSED) Judgment
Filed and entered: October 30, 1954,
PAUL P. O'BRIEN, Clerk.

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No. 480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

J. ELROY MCCAW AND JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, Tax Commissioner of the Territory of Hawaii,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 466-472) is not reported.

The opinion of the Court of Appeals is reported in ..... F. 2d .....

JURISDICTION

The petition for certiorari seeks review under section 1254 (1) of the Judicial Code (28 U.S.C. 1254 (1)), of a case which reached the Court of Appeals for the Ninth Circuit upon appeal from the United States District Court for the District of Hawaii under sections 1291 and 1294 of the Judicial Code (28 U.S.C. 1291 and 1294).

QUESTIONS PRESENTED

Upon appeal from a judgment of the United States District Court for the District of Hawaii, which in an action attacking the constitutionality of a territorial tax dismissed the case without prejudice at the threshold on the ground that the case belonged in the territorial courts, did the Court of Appeals err in dismissing the appeal as moot when the territorial court case had reached it after trial on the merits in the territorial court and it had just filed an opinion upholding the territorial tax?

Assuming said appeal from the United States District Court of the District of Hawaii is not moot, was disposition on the merits in the District Court of the action attacking the constitutionality of the territorial tax a matter of right, and if not did the District Court abuse its discretion in dismissing the action?

STATUTES INVOLVED[1]

The statutes involved are as follows:

The Johnson Act (28 U.S.C. 1341). (This was cited by the District Court in dismissing the case but is not set out in the petition.) It reads as follows:

> "§ 1341. **Taxes by States.** The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[1] Statutes are set out as they read during the taxation periods involved and at the time this action was instituted.

Section 1575, Revised Laws of Hawaii 1945. (This is the section of the law under which petitioners, after dismissal of the District Court suit, brought in the territorial court the suit which became No. 13920 in the Court of Appeals, and which also is on petition for a writ of certiorari (No. 481 in this Court). This provision is not set forth in either petition. It read as follows:

"**Sec. 1575. Payment to Territory under protest.** Moneys representing a claim in favor of the Territory may be paid to a public accountant of the Territory under protest in writing signed by the person making such payment, or by his agent, setting forth the grounds of such protest, in which event the public accountant to whom such payment is made shall hold the money so paid for a period of thirty days from the date of payment.

"Action to recover the money so paid, or proceedings to adjust the claim may be commenced by the payer or claimant against the public accountant to whom the payment was made, in a court of competent jurisdiction, within such period of thirty days, and in default of bringing such suit or proceedings within such period, the money so paid shall be by such accountant deposited in the treasury of the Territory, and the same shall thereupon become a government realization.

"If action to recover the money so paid under protest, or proceedings to adjust the claim, shall be commenced within thirty days after payment of the money under protest, the amount so paid shall be transmitted by the public accountant to the treasurer of the Territory who shall hold the same as a special deposit pending the final decision of the cause. If the final decision of the cause shall be in favor of the claimant, the treasurer of the Territory shall pay to him out of such special deposit, such amount as shall have been adjudged to be due to him in such cause; the amount so to be paid to be ascertained by the treasurer from a certified copy of the judgment of the court, in which the cause was finally determined, which shall be his authority and warrant for such payment."

Section 5463 of the Revised Laws of Hawaii 1945, as amended by Act 253 of the Session Laws of Hawaii 1945. (This is the section of the territorial tax law specifying that delinquency penalties and interest are a part of the tax. It was applied both by the United States District Court in this case and by the Supreme Court of Hawaii in the other case, but is not set forth in either petition.) It read as follows:

> "Sec. 5463. Penalty for delinquency. A penalty of ten per centum shall be added to and become a part of any tax or portion thereof becoming delinquent, and in addition thereto said tax as so increased shall bear interest at the rate of two-thirds of one per centum for each month or fraction thereof from the expiration of fifteen days from the date of delinquency until paid, which interest shall be added to and become a part of such tax."

STATEMENT OF THE CASE

On November 15, 1950 petitioners filed this action in the United States District Court (R. 3-30). They are a co-partnership known as Island Broadcasting Company, and at that time were operating radio station KPOA in Honolulu, Territory of Hawaii.

The complaint (R. 3-30) attacked the validity of section 5455, subsection D, Chapter 101, Revised Laws of Hawaii 1945, a territorial tax law, which applies to the business of radio broadcasting as well as other business. Jurisdiction was invoked under 28 U.S.C. 1331, 1332, and 1337. The complaint sought both equitable (R. 29) and declaratory (R. 27) relief. Petitioners moved for a temporary injunction (R. 36), and for summary judgment (R. 113-131).

The territorial tax commissioner (whose successor in office is the respondent here and who will be referred to as "respondent") filed a motion to dismiss the complaint, attacking it for failure to show grounds for equitable relief, for failure to take the case out of the Johnson Act (28 U.S.C. 1341) and the policy therein set forth, and upon other

grounds (R. 36-40). Respondent also filed Objections to the Motion for Interlocutory Injunction (R. 40-52), and a Motion for Summary Judgment (R. 141-144).

Each party filed supporting affidavits and exhibits. Petitioners' appear at R. 30-34, 114-131, 154-157 together with a number of unprinted exhibits; respondent's appear at R. 52-113, together with a number of unprinted exhibits.

When the cause came on for hearing on the motions the Court "laid aside the various motions of the parties and raised on its own the question of whether or not it had jurisdiction and if so, should it as a matter of judicial discretion exercise the same" (R. 159). After hearing argument thereon, for which very considerable time was allowed, the Court ruled (R. 466-471):

> That the Territory of Hawaii is so constituted under the Hawaiian Organic Act that its tax litigation is protected by the Johnson Act (28 U.S.C. 1341) and the policy therein set forth (R. 468).
>
> That the remedy of the taxpayers was to pay under protest and sue for a refund in the territorial court, this being an adequate statutory remedy and there being adequate provision elsewhere made for interest (R. 469).
>
> That under the statute penalties became part of the tax and were recoverable if the tax was recoverable (R. 469).
>
> That if grounds for an equity application existed the taxpayers could resort to the equity court of the Territory, there being no statute prohibiting such an equity suit (R. 470).
>
> That the complaint would be dismissed but such dismissal would be without prejudice, in order that the taxpayers might return to the federal court if, contrary to the conclusions reached, the taxpayers could not obtain hearing on their contentions in the courts of the Territory (R. 471).

The above ruling was made January 24, 1951 and Judgment Dismissing the Action Without Prejudice was entered thereon February 5, 1951 (R. 159-160).

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> That the complaint would be dismissed but such dismissal would be without prejudice, in order that the taxpayers might return to the federal court if, contrary to the conclusions reached, the taxpayers could not obtain hearing on their contentions in the courts of the Territory (R. 471).

The above ruling was made January 24, 1951 and Judgment Dismissing the Action Without Prejudice was entered thereon February 5, 1951 (R. 159-160).

Petitioners thereafter brought an action in the Circuit Court of the Territory, First Circuit, employing the statutory remedy of payment under protest followed by suit for recovery.[2] This action was tried, resulting in findings of fact and conclusions of law of the territorial circuit court, which were affirmed by the Supreme Court of Hawaii. On appeal from the Supreme Court of Hawaii, the Court of Appeals in its No. 13920 affirmed the judgment below, on grounds which appear from the Statement of the Case in the Brief for the Respondent in Opposition to the Petition for Certiorari in that case, No. 481 in this Court.

Meanwhile, petitioners had appealed from the judgment dismissing without prejudice the action in the United States District Court. In No. 12900 in the Court of Appeals that court quoted the ruling of the United States District Court and said:

> "In dismissing the action the trial court had in mind the principle declared in such cases as *Matthews v. Rodgers*, 1932, 284 U.S. 521; *Great Lakes Dredge & Lock Co. v. Huffman*, 1943, 319 U.S. 293, 300-301; *Hillsborough v. Cromwell*, 1946, 326 U.S. 620; that suits to prevent the enforcement of a tax statute will not be entertained by the Federal courts when the statute has provided for payment under protest to be followed by an action in the State courts to recover the amount so paid." (R. 484; Pet. App. 9A-10A.)

However, the Court of Appeals, having just filed its opinion in its No. 13920 upholding the territorial tax (No. 481 in this Court) dismissed the appeal from the United States District Court as moot and accordingly did not decide whether the United States District Court was or was not justified in declining jurisdiction, or whether the Johnson Act (28 U.S.C. 1341) does or does not apply to the Territory of Hawaii.

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[2] Section 1575, Revised Laws of Hawaii 1945 (supra, p. 3).

By way of correction of page 11 of the petition, respondent states that this case and the other case in the Court of Appeals (No. 481 in this Court) were not consolidated, as appears from Appendix 12-16 of Respondent's Brief in No. 481. The cases merely were consolidated for argument. A separate opinion and separate judgment were rendered in each case, as appears from the Transcripts of Record.

Other corrections of Petitioners' Statement of the Case will be made in the argument below.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN DISMISSING THE APPEAL AS MOOT.

Petitioners assert that the United States District Court, on the motions filed in that Court, should have rendered judgment on the merits (Pet. 2-3, 6, 28). In this case, as in the other case on petition for certiorari, the merits are argued in the petition (Pet. 13-28).

This case was not tried, the other case was. It is the theory of the petition that the merits should have been passed upon by the District Court without a trial. Thus petitioners seek to lay aside the facts which emerged upon a full trial. Those facts showed that petitioners' radio station in Honolulu does not occupy the position of the two state of Washington stations involved in *Fisher's Blend Station v. Tax Commission*[3] as to which the facts were stipulated in 1935. Respondent's brief in No. 481 has developed this in Point II-A.

The record in the United States District Court was sufficient to show a dispute on the facts and preclude petitioners from obtaining a summary judgment.

Petitioners alleged in the District Court (R. 17, par. XIII) that their broadcasting was predicated upon a "service area" extending vast distances. In the exhibits incorporated in respondent's Objections and respondent's Motion for Summary Judgment, respondent demonstrated that peti-

[3] 297 U.S. 650.

tioners' theory as to their service area could not be accepted in any pretrial proceeding and that they could not possibly, as a matter of law, occupy the position the two Washington stations were stipulated to have in the 1935 case. Respondent:

> Produced the F.C.C. Regulations and Standards of Good Engineering Practice showing that a regional station,[4] instead of being designed for effective transmission over an entire zone, as in 1935,[5] under the present F.C.C. regulations "is designed to render service primarily to a metropolitan district and the rural area contiguous thereto." (R. 44-45; 47 C.F.R. Sec. 3.22 [c].)
>
> Showed by the F.C.C. Standards of Good Engineering Practice that a Class III-A station[6] is "normally protected to the 2500 uv/m groundwave contour nighttime and the 500 uv/m groundwave contour daytime" (R. 44-45; 47 C.F.R., 1949 edition, p. 120), and produced the map filed by petitioners with their application for a F.C.C. license, showing these protected contours (R. 86) which do not even include the whole of the Territory of Hawaii.
>
> Produced F.C.C. computations showing that, according to the F.C.C. standards and graphs, a station such as petitioners' is not expected to render satisfactory service at the distances claimed by petitioners (R. 45-47, 84-85, 89-90. Compare R. 120, 122, 124-126, 216-217).

It at no time was conceivable that the Court of Appeals would proceed to the merits when the trial court had not done so.[7] And the futility of remanding the case to the United States District Court for consideration of the merits when the territorial court case had been tried and judgment

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[4] Petitioners' station is on a regional channel (R. 149).

[5] Compare the stipulated facts in the *Fisher's Blend case*, set forth in Respondent's Brief in No. 481, p. 22.

[6] Petitioners' station is a Class III-A station (R. 149).

[7] *McDonald v. Smalley*, 1 Peters 620, 7 L.Ed. 287; *Bradstreet v. Potter*, 16 Peters 317, 10 L.Ed. 978.

reached on the merits is equally apparent.[8] Thus, whichever way the Court of Appeals ruled in the appeal from the territorial court case there was no substantial question remaining in the appeal from the United States District Court.

Respondent further submits that the United States District Court rightly dismissed the action, as shown in the next point.

II. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DID NOT ERR IN DISMISSING THE ACTION ON THE GROUND THAT THE CASE BELONGED IN THE TERRITORIAL COURT.

A. Scope of the Johnson Act; the policy involved.

The Johnson Act (28 U.S.C. 1341) provides that:

> "§ 1341. **Taxes by States.** The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This statute is derived from the Act of August 21, 1937.[9] It was founded on the already long established policy of remitting taxpayers to their remedies in the state courts where adequate.[10] Congress particularly desired to free, from interference by federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid.[11] Under the statute and long established policy on

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[8] *Mullaney v. Anderson*, 342 U.S. 415 (Pet. 33) does not sustain petitioners but on the contrary is an instance of this Court allowing parties to be added in order to preserve the status of a case which had been fully tried and judgment reached below on the merits, rather than have the case start over again.

[9] 50 Stat. 738, c. 726, amending the first paragraph of section 24 of the old Judicial Code, former 28 U.S.C. 41 (1). The Act added a sentence to provide that "no district court shall have jurisdiction" of any suit to restrain state tax collection where an adequate state court remedy exists "at law or in equity." The Reviser's Notes show that section 1341 restates this sentence, the words "at law or in equity" having been omitted as unnecessary.

[10] *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-301, citing *Matthews v. Rodgers*, 284 U.S. 521, 525-6.

[11] *Great Lakes Dredge and Dock Co. v. Huffman, supra*, citing S. Rep. No. 1035, 75th Cong., 1st Sess.; H.R. Rep. No. 1503, 75th Cong., 1st Sess.

which it was based, it is true, whether the relief sought is equitable or declaratory, that:

> "* * * it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back."[12]

The Johnson Act and the policy there stated apply, as well, when the taxpayers can be heard in a state court for equitable relief. A decisive case is *Whitmore v. Ormsbee*, 329 U.S. 668, aff'g per curiam 64 F. Supp. 911. A three judge court had ruled that radio broadcasting is in part intrastate commerce and in part interstate commerce (the court citing the *Fisher's Blend case*, 297 U.S. 650, which petitioners interpret differently), that the question involved was whether the state tax imposed an undue burden upon the interstate commerce, that the Johnson Act applied to this question as well as any other, that the ordinary method of payment under protest was adequate, and that if this method should be burdensome by reason of the large amount of accumulated back taxes and penalties, then equitable relief in the state court would be an adequate remedy, and this notwithstanding a state statute forbidding injunctive relief in tax cases which, however, the state courts had held did not apply in extraordinary circumstances. Hawaii has no statute limiting injunctive relief in tax cases. This Court affirmed the *Whitmore* case per curiam, upon the authority of *Hillsborough v. Cromwell*[13] upon which petitioners rely, and *Matthews v. Rodgers, supra*.[14]

B. Applicability of the Johnson Act in Hawaii.

The Johnson Act and the policy there stated apply in Hawaii. The courts of the Territory of Hawaii occupy a

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[12] *Great Lakes Dredge and Dock Co. v. Huffman, supra*, 319 U.S. at pp. 300-301 (a declaratory relief case); *Toomer v. Witsell*, 334 U.S. 385, 392 (injunctive relief case).

[13] 326 U.S. 620, 623.

[14] 284 U.S. 521, 525.

relatively similar position to the federal courts as do state courts, and this principle makes applicable the rules of law as to the types of litigation to be left by federal courts to state courts.[15] Such a rule is involved here.

It is not material whether the Johnson Act applies by its terms, the word "state" being read to include territories as it sometimes is,[16] or whether it applies because the Hawaiian Organic Act and the case law make applicable the policy stated in the Johnson Act.[17] Whether or not the statute literally applies, the District Court properly adhered to the long standing policy expressed in it.[18]

C. Petitioners did not meet the Johnson Act.

The complaint set forth that the time for appeal to territorial courts had expired (R. 27, par. XXIV); that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery (R. 28, par. XXV); that "the slightest financial burden" would affect petitioners and they had invested in the station in the belief that Congress had pre-empted the field of radio communication (R. 8, par. V; R. 22-23, par. XIX). These, and other contentions since made, will be considered in the following paragraphs. In none of them did the petitioners meet the Johnson Act or the policy there set forth.

1. The theory of the complaint that, by letting their time for appeal expire, petitioners excused themselves from resorting to territorial courts, in any event is met by the fact that another remedy remained, that of payment under protest followed by suit for recovery under the statute, section 1575 of the Revised Laws of Hawaii 1945, supra p. 3. Un-

[15] *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383; *Ackerman v. I.L.W.U.*, 187 F. 2d 860, 868 (C.A. 9th), cert. denied 342 U.S. 859; *Alsna v. Rice*, 172 F. 2d 176, 178-9 (C.A. 9th), cert. denied 338 U.S. 814; *Wilder S.S. Co. v. Hind*, 108 Fed. 113, 115, 116 (C.A. 9th), aff'd 183 U.S. 545.

[16] *Andres v. United States*, 333 U.S. 740, 745.

[17] Note 15, *supra*.

[18] *Great Lakes Co. v. Huffman*, supra; *United States v. City of New York*, 175 F. 2d 75 (C.A.. 2d), cert. denied 338 U.S. 885.

der this latter statutory remedy action was brought by petitioners in the territorial court (No. 481 in this Court). This statutory remedy has been employed in the Territory in many instances to determine the applicability and validity of territorial tax laws,[19] and is not uncertain.

Hillsborough v. Cromwell, 326 U.S. 620, on which petitioners rely (Pet. 2, 5-6, 35-36) does not hold that one can take himself out of the Johnson Act by not pursuing his state remedy; it holds that a state remedy is inadequate which affords no reduction of a tax assessment in the event of discriminatory taxation, permitting only that the taxpayer discriminated against obtain an increase in the taxes of others.

2. The allegation in the complaint that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery, overlooks that the suit for recovery is not against the Tax Commissioner personally but to the contrary is a statutory remedy that in effect is a suit against the Territory of Hawaii.[20]

3. The allegation in the complaint that the imposition of the tax was unexpected and any tax at all would be a burden, is met by *Whitmore v. Ormsbee, supra*, which holds that if there are extraordinary circumstances precluding resort to the ordinary method of payment under protest, then resort should be had to the state equity court, the Johnson Act having the effect of remitting the taxpayer there. Moreover, this allegation falls short of an allegation of inability to pay. Instead, the complaint alleges refusal to pay (R. 28, Par. XXV). Furthermore, respondent showed by the affidavit of the deputy tax commissioner and the books of the company (these exhibits being incorporated by reference

[19] *Brodhead v. Borthwick*, 174 F. 2d 21 (C.A. 9th), aff'g 37 Haw. 314, cert. denied 338 U.S. 847; *Pan American Airways v. Godbold*, 36 Haw. 170; *Wright v. Borthwick*, 34 Haw. 245; *Bishop v. Hill*, 33 Haw. 371; *New York Life Ins. Co. v. Hapai*, 21 Haw. 424.

[20] *Wright v. Borthwick, supra*, 34 Haw. 245, 255; *Great Northern Insurance Co. v. Read*, 322 U.S. 47; *Ford Co. v. Department of Treasury*, 323 U.S. 459.

in the Objections to Interlocutory Injunction [R. 51] and Motion for Summary Judgment [R. 143]) that the imposition of the tax was not unexpected or beyond the financial ability of the company (R. 53-54, 93-108).

4. In oral argument appellants made the further contention, not contained in the complaint, that if they paid under protest and were successful in sustaining their contentions as to the invalidity of the tax, they would not be refunded that portion of their payment consisting in the delinquency penalties and interest by which the tax had increased due to failure to resort promptly to the remedy of payment under protest. The petition relies on this argument (Pet. 5, 7-9, 36, 38-39, 40).

This argument seeks to overlay on section 1575 (supra, p. 3) certain provisions concerning the administrative tax appeals which petitioners did not take, and which accordingly are not involved. Moreover, petitioners place a forced misconstruction on those provisions. The argument assumes, in flat disregard of the pertinent statutory provision,[21] that the word "tax" does not include penalties and interest added to the tax and becoming "a part of such tax," as the statute provides. Of course the rule is that words used in a statute mean what the statute says they mean.[22] This obvious answer was made in the District Court (R. 272), and the court so ruled, saying:

> "* * * the particular law under which taxes claimed to be due makes any penalty that is assessable a part of the tax, and if the tax is recoverable, why, the part goes with it, for the whole consists of all of its parts." (R. 469.)

Of course if the tax is valid and not refundable the penalties are not refundable either. The rule in Hawaii is the

[21] Section 5468, supra p. 4.

[22] *Fox v. Standard Oil Co.*, 294 U.S. 87, 95, stating the general rule; *State of California v. Hisey*, 84 F. 2d 802, 805 (C.A. 9th) stating the rule that penalties and interest are a part of a tax when and to the extent that the tax statute so provides.

usual rule, i.e., where the tax law provides for penalties and interest, one who contests a tax is liable to delinquency penalties and interest upon the amount found to be legally due if not paid on time.[23] The taxpayer who desires to avoid this should promptly put up the tax money that is in litigation.

5. Petitioners now say that "it was agreed by the parties that this suit would be initiated in the U. S. District Court"

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[23] The Supreme Court of Hawaii so ruled in the territorial court case (No. 481 in this Court), citing section 5463 (supra p. 4) which makes delinquency penalties and interest a part of the tax, and also citing many cases. The Supreme Court said:

"Although, as we have said, supra, the complainants' assignment of error number 33 has been waived by the noninclusion thereof in their specifications of error—and, also, their failure to present either argument or authorities pertinent thereto—but, nevertheless, to avoid any possible uncertainty which might arise because of our failure to consider whether interest and penalties should be added to a delinquent tax, we declare that the rule of law is that interest and penalty shall be added to a tax lawfully payable, whenever there has been failure to pay such tax when due, and same has become delinquent, the interest and penalty automatically following the former pursuant to statutory provisions. Section 5463, Revised Laws of Hawaii 1945, as amended by Act 253 of the Session Laws of Hawaii 1945.

"Further, there is a well-established rule that where a tax law provides for penalties and interest, one who contests the tax does so in peril of the penalties and interest, and is liable for penalties and interest upon such amount unpaid as is found to be legally due.

"See Spencer v. Babylon R.R. Co., 250 Fed. 24 (C.A. 2d), a case arising in New York; Washington Water Power Co. v. Kootenai County, 270 Fed. 369, as modified 273 Fed. 524 (C.A. 9th), a case arising in Idaho; State of California v. Hisey, 84 F. 2d 802, 805 (C.A. 9th); State v. Holly Sugar Corp., 57 Wyo. 272, 116 P. 2d 847; State v. Great Atlantic and Pacific Tea Co., 190 La. 925, 183 So. 219, cert. denied 305 U.S. 637; Citizens' Waterworks v. Hughes, 362 Ill. 136, 199 N.E. 265, and People ex rel Stuckart v. Chicago etc. Ry. Co., 270 Ill. 477, 110 N.E. 720; Brittain & Henry v. Robertson, 120 Miss. 684, 83 So. 4, and Hamel v. Marlow, 171 Miss. 559, 157 So. 905; Rixeys Executors v. Commonwealth, 125 Va. 337, 99 S.E. 573, 101 S.E. 404; Power v. City of Detroit, 139 Mich. 30, 192 N.W. 288; Western Union Tel. Co. v. State, 64 N.H. 265, 9 Atl. 547, and Winnipiseogee Lake Mfg. Co. v. Gilford, 64 N.H. 514, 15 Atl. 137; Cedar Rapids & M. R. Co. v. Carroll County, 41 Iowa 153, 191; Jaggar v. David, 121 Kan. 737, 250 Pac. 260."

(Record in No. 481, 117-119)

(Pet. 4). In the District Court petitioners' counsel admitted that the Territory always had disagreed with petitioners' position that the federal suit was the proper remedy and had made no agreement to waive the point (R. 226, 264-266, 290-293, 330).

6. Petitioners (Pet 5, 10, 18, 24, 30, 40) assail the procedure followed by the territorial circuit court (the trial court) in the rendering of the decision in the territorial court case, now on petition for certiorari in this court as No. 481. This matter is covered by Respondent's Brief in No. 481 at note 4, and on pages 12, 36-37.

7. Under the rule of *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 104, 105-106, even if the Johnson Act and the policy therein set forth did not apply nevertheless this case would have had to be held in the District Court awaiting the outcome of territorial litigation. This was true because the scope and application of the tax law in respect of radio broadcasting had not been determined by the territorial courts. (See R. 301-302, 379-382.) The rule that state courts must construe state statutes before constitutional issues are reached, applies in the Territory of Hawaii.[24] Hence, the District Court suit did not afford a speedier route, if that be material. (See Pet. 9)

8. Concluding this point, respondent calls attention to the case of *Georgia R. R. and Banking Co. v. Redwine*.[25] There, on a suggestion by the Attorney General of Georgia that there was an adequate state court remedy, a case that had made its way up to this Court was "ordered continued for such period as will enable appellant with all convenient speed to assert such remedies." It was not until the state court remedies had been tried and had been proved inadequate that the case was finally heard in this Court; it then was remanded to the District Court for determination of the merits. This case demonstrates the strength of the Johnson Act policy.

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[24] *Stainback v. Mo Hock Ke Lok Po*, supra, 336 U.S. 368, 383.
[25] 339 U.S. 901, 342 US. 299.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RHODA V. LEWIS
Deputy Attorney General of Hawaii
Counsel for Respondent.

January 7, 1955.

End

DEC 13 19
HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1954

No. 481

J. ELROY MCCAW and JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, the Tax Commissioner of the Territory of Hawaii, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, J. ELROY MCCAW and JOHN D. KEATING, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the Supreme Court of the Territory of Hawaii.

OPINIONS BELOW

The Supreme Court for the Territory of Hawaii wrote an opinion reported as *McCaw v. Fase*, 40 Haw. 97, 156. Appropriate portions of that opinion will be quoted throughout this Petition. The opinion of the Court of Appeals is reported in ..... F.(2d) ..... and is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 30, 1954. An order staying the mandate of the Court of Appeals pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for a Writ of Certiorari, provided such petition was filed in the clerk's office of the Supreme Court of the United States on or before December 20, 1954, was entered on November 12, 1954. The jurisdiction of this court is invoked under Title 28 U.S.C.A. Sec. 1254 (1); and an appeal should be allowed on this case, instead of certiorari under Title 28 U.S.C.A., Sec. 1257(2) IF HAWAII IS ALLOWED THE STATUS OF A STATE, AS IT CLAIMS.

QUESTIONS PRESENTED

1. Is the "Business" and "Operation" of a radio station beyond the scope of territorial legislation?

2. Appellants' "operations" reach ships at sea, altogether outside the Hawaiian Territory's domain, but wholly within the license given by the Federal Communications Commission, so therefore, does not this "excise tax" or "gross receipts" tax on the "operations" of appellants' invade a subject matter which was preempted by the Communications Act of 1934?

3. Does not the Supreme Court of Hawaii's decision holding:

> "Upon such premise, we hold that *neither distance* at which emanations are receivable, *nor classification* for control and regulation, *but the sphere of actual commercial value,* is the criterion for determination of whether broadcasting is 'intra-

> state,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation." (Italics ours)

conflict with the prescribed duties of the Federal Communications Commission who ruled in 1928:

> "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasters are not given these great privileges by the United States Government for the *primary benefit* of advertisers. *Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.*" (Emphasis in original)

4. Since the "benefit" derived by advertisers through the use of radio must be incidental and entirely secondary to the interest of the public, according to a ruling of the Federal Communications Commission, whose regulatory power can only exist by virtue of a legislative predicate on interstate commerce, does not the Supreme Court of Hawaii's decision that "the *sphere of actual commercial value* is the criterion for determination of whether broadcasting is 'intrastate' or 'interstate'" make the advertisers the primary beneficiaries of broadcasting, and the public interest secondary, in conflict with such ruling?

5. Does not the Supreme Court of Hawaii's opinion, erroneously affirmed by the Court of Appeals, hold in effect: That if there were a station in the Territory of Hawaii of sufficient power that the reception of its programs in another state or territory was sufficiently constant, so as to be of "commercial value" outside

the Territory of Hawaii, its "operations" would be tax-free while appellants would be subject to taxation? Therefore, is not the Hawaiian Law *a discriminatory tax?*

6. Should not this Court take judicial notice that stations, even of small wattage, located on or near state lines, will now be tax free, while stations of higher wattage located in the center of a state, will be taxed if this Court of Appeals decision is allowed to stand?

7. Who will be deciding hereafter, if the Hawaiian Supreme Court and the Court of Appeals decisions are upheld, whether a radio signal or a radio station's "operations" are "commercially constant" or of a "commercial value" outside of a given area? The various state courts, or the Federal Communications Commission, who under the law, must "classify stations" according to power and public need?

8. Does not this tax constitute a multiple burden upon interstate commerce?

9. As a matter of law, should not the tax have been held invalid since all the judicial tests for such a decision were fully met by the appellants' complaint, affidavits, exhibits, testimony, and practicality itself, demonstrated that the *ether* must be *owned* by the national government under which a licensee operates for a limited period, after waiving "any property right" in the *ether,* or to the "use" of a particular frequency?

10. The appellants and appellee stipulated, solemnly and in writing (see page 346 of Record before Court of Appeals, and Appendix A hereof) that all exhibits

and the Transcript of Evidence (three legible, bound copies of Testimony) "may be sent to the Court of Appeals as the Record on Appeal," therefore, was it not error for the Court of Appeals to state, "the appellants * * * have not brought up any of the evidence"? Especially, was this assertion not error since this stipulation was entered into pursuant to Rule 10 of the Court of Appeal's own Rules?

11. Is the Hawaiian judicial process where the prevailing lawyers write the opinions of the judges, due process?

12. Does not the decision of the Hawaiian Supreme Court and the Court of Appeals conflict with the prior rulings of this court and the duties of the Federal Communications Commission?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Communications Act (Title 47 U.S.C.A. Sec. 151 to 609), particularly Sections 153, 301 and 303 of said Act; an excerpt from page 47, PUBLIC SERVICE RESPONSIBILITY OF BROADCASTING LICENSEES, a Ruling promulgated by the Federal Communications Commission, March 7, 1946; the Waiver to the use or property right in any particular frequency required by the Communications Act, and Rulings of the Federal Communications Commission to be signed by all applicants; the Hawaiian Laws involved, namely, Chap. 101, Sections 5455, 5535, 5219, 1575, Laws of Hawaii; and Rule 10(1) Rules of the U. S. Court of Appeals for the Ninth Circuit are set forth in Appendix A, *infra,* pages 1A to 7A.

STATEMENT OF THE CASE

Appellant J. Elroy McCaw is a citizen and resident of Centralia, Washington, and Appellant John D. Keating, a citizen and resident of Portland, Oregon. In 1946, they obtained a license for a limited term from the Federal Communications Commission to operate radio station KPOA in Honolulu, Territory of Hawaii, under the terms of the Communications Act of 1934, as amended (47 U.S.C., Sec. 151-609). The station, of 5000 watts power, commenced broadcasting on October 15, 1946, and is affiliated with the Mutual Broadcasting System.

It was also necessary under the law that appellants file and register with the International Telecommunication Union, Geneva, Switzerland, a specialized agency of the United Nations, its frequency, the allocated power of the station, and the names of the licensed operators, namely, the appellants (Exhibits "B" and "D").

The appellants initiated an action in the United States District Court for the Territory of Hawaii for relief against the enforcement of Chap. 101, Sec. 5455 which is an "excise" or "Gross Receipts" tax on the business and "operation" of a radio broadcasting station, contending that their remedies, if any, were inadequate and had expired in territorial courts. Such action was dismissed without prejudice and is now a companion case to this Petition for a Writ of Certiorari before this Court at this term.

Appellants were coerced, by the inaction of the United States District Court, into filing this suit on May 3,

1951, in the Circuit Court, First Judicial Circuit, Territory of Hawaii, under Sec. 1575 of the Laws of Hawaii, to recover a sum of $7,637.33 which was paid to the Tax Commissioner under protest. This suit was filed by agreement with the appellee in order to insure more than a sum of $5,000.00 being involved, which is the jurisdictional amount needed to appeal from the Supreme Court of Hawaii to the United States Court of Appeals for the Ninth District under Sec. 1293, Title 28 U.S.C.

Appellants filed a complaint (Tr. 3-23) setting forth their allegations as to the unconstitutionality of the tax law, and alleged that *all* broadcasting was interstate commerce; that Congress had preempted the subject matter of radio broadcasting to the exclusion of any legislative concern of a Territory by the enactment of Title 47, U.S.C. Sections 151-609. Appellants' other remedies under the Hawaiian laws had expired by the time this suit was filed. Appellants had no defense whatsoever against this alleged illegal tax law, except the defense of unconstitutionality. Appellants could not question at this time, since their time for appeal had expired, the "right" or "wrong" of any assessment. What was "interstate" or "intrastate" revenue or receipts was decided solely, finally, and entirely by the Tax Commissioner and was not subject to any review.

Upon appellants' filing of this suit for the return of $7,637.33, including penalties (that portion of the suit asking the return of penalties is really a farce for "penalties" can never be recovered under the Hawaiian Laws, as appellants will set out hereinafter) the appel-

lee promptly filed a counterclaim for the additional sum of $14,595.98. The Territorial "snare" or "trap" was thus succesfully closed and the appellants were nicely "caught," as appellants had unsuccessfully attempted to convince the United States District Court in the companion case to this, would happen.

The trial judge rendered an oral "decision" (?) from the bench in favor of appellee but the writen decision of the Judge was then written, "barefaced" and without apology, by counsel for the appellee. And, that is the "decision" which has been successfully sustained by appellee.

The findings "brought forth" by the local territorial court, or more accurately, "by appellee's counsel," and sustained by the Hawaiian Supreme Court, appear on page 3 of the Court of Appeals' decision (see Appendix B) and all of them monotonously refer and pertain only to the "sphere" or "extent" of appellants' "commercial coverage."

In Findings 1, 2, 3, 4, 8 and 9, the only ones considered by the Court of Appeals, were those "Findings" which sustained the Hawaiian Supreme Court's ultimate opinion that "*neither distance* at which emanations are receivable, *nor classification* for control and regulation, *but the sphere of actual commercial value,* is the criterion for determination of whether broadcasting is 'intrastate' or 'interstate.' "

The territorial Circuit Court, as aforesaid, "ruled" in favor of appellee. An appeal was taken to the Supreme Court of Hawaii who rendered an opinion (*McCaw v. Fase,* 10 Haw. 121), holding:

> "Upon such premise, we hold that *neither distance* at which emanations are receivable, *nor classification* for control and regulation, *but the sphere of actual commercial value,* is the criterion for determination of whether broadcasting is 'intrastate,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation."

Attention was called to the Court of Appeals that this Hawaiian decision, and now, the decision of the Court of Appeals, is really a "classification of a radio station" and in direct conflict with the prescribed duties of the Federal Communications Commission, who are the only agency charged by Federal law "to classify radio stations" (See Sec. 303, Title 47, U.S.C.) and courts and states, especially Territories, cannot do so.

The Federal Communications Commission had issued a Ruling that "broadcasters are not given these great privileges by the United States Government for the *primary benefit of advertisers.* Such benefit as it is derived by advertisers must be incidental and entirely secondary to the *interest of the public*" (See Public Service Responsibility of Broadcast Licensees, 1946, p. 14).

It was called to the attention of the lower courts, again and again, that the foregoing principle which was promulgated as a "Basic Ruling" for radio as early as 1928 was now reversed and the *advertiser* placed in the *primary* position, and the listening public is now in a *secondary* place, just for the sake of sustaining the doubtful "pride of opinion" in an excessive sovereign's right to tax.

In preparing the appeal from the Supreme Court of Hawaii, appellants and appellee solemnly entered into a stipulation pursuant to Rule 10 of the Rules of the Court of Appeals (former Rule 11, now Rule 10, at the time this case was appealed permitted such stipulations) and all the exhibits in the case before the Supreme Court of Hawaii were taken up as part of the Record of Appeal to the Court of Appeals in this case (see Stipulation, Appendix A).

Scant attention was paid by the trial court, the Hawaiian Supreme Court, or by the Court of Appeals to the rights of the listener. No listener who is on a ship at sea, or those in Alaska, Samoa, and the Mainland who have the right to receive appellants' broadcast, can ever be considered again as "listeners" of appellants, since this unique "classification" of a radio station, without a "short wave" broadcast being set up especially for them, as the court's findings deemed necessary, but the courts forgot that the listener may not have a short wave set. This was pure legal fiction for the "listeners" will continue to "listen," and will continue to write to appellants, as set out later herein.

The Communications Act did not give Territories the right "to classify stations," either as to "listeners" or as to their "commercial sphere," and this point was repeatedly called to the attention of the lower courts.

Evidence was introduced showing appellants sold time in Samoa (see Plaintiff's Exhibits R1 and R2). Boxes of letters, hundreds and hundreds of letters, from listeners from as far west as Australia; north to Alaska; as far east as New York, and from every state

in the Union were introduced into evidence (Exhibit R1). Yet, the lower courts, following an Arkansas case (*Beard v. Vinsonhaler, post*), blindly and unswervingly, "classified" these listeners as a sort of a radio "nut," or "D-X'ers," as they were derisively termed. Plaintiffs introduced evidence from Exhibits "A" to "V," which exhibits are now before this court pursuant to an order entered by the Chief Judge of the Court of Appeals, sending up all the original Exhibits and papers to this Court.

Appellants' evidence includes charts prepared according to an International Agreement showing the world allocation of frequencies in the radio spectrum from 10,000 cycles to 10,500,000 cycles and the portion allocated to the United States. Appellants' evidence showed that all radio signals, more than 3 degrees above the ground, became "skywaves" and traveled off into space and were incapable of being confined within a national boundary. The lower court conceded that a radio signal of small wattage will travel around the world. The evidence of appellants showed what happens to a signal when it goes into the "E" layer or into the "F" layer of space, but all of this evidence was shrugged off—politely, of course.

A map of the world showing how the world had been divided into three regional divisions, with the United States and Hawaii being allocated unto Region II, of the world allocation of radio frequencies, was placed in evidence.

The evidence included also, the applications appellants had to file for a radio license with the Federal

Communications Commission, and the applications for a renewal thereof at stated intervals, all showing positively that the right of a licensee of a frequency, or to the use of the ether was not a private right.

Evidence was introduced showing the extent and sensitivity of the control over operators of radio stations by the Federal Communications Commission, including their "financial," "character" and "technical" qualifications.

The Public Service Responsibility of Broadcasting, a report issued by the Federal Communications Commission on March 7, 1946, commonly called the "Blue Book," was introduced into evidence, showing that appellants had only a 70% of its potential radio time to sell and 30% of its time had to be used for public service endeavors without compensation.

Evidence was also introduced showing that this tax was really a tax upon "operations" and that the "economic aspects" of radio included "financial aspects" which had already been pre-empted by the Congress to the exclusion of any concern of a Territory.

Notwithstanding apellants' allegations to the effect that the Communications Act did not create new private rights, and that the ether was owned by the public as opposed to a mere sovereign regulation, the territorial court and the Court of Appeals proceeded to "classify radio stations" in conflict with Sec. 303 (a), Title 47 U.S.C.

It was also called to the attention of the territorial Courts and Court of Appeals that this Hawaiian tax law was identical with the tax law struck down by this

Court in the *Fisher's Blend* case, *Fisher's Blend Stations, Inc. v. State Tax Commission,* 297 U.S. 650, 58 S.Ct. 608, the Court stating at p. 610:

> " * * * The essential purposes and indispensible effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. *See Federal Radio Commission v. Nelson Bond & Mortgage Co.,* 289 U.S. 266, 279, 53 S.Ct. 627, 77 L.ed. 1166." (Emphasis ours.)

Appellee and the lower courts seemed to think that because the facts were "stipulated" in the *Fisher's Blend* case, that made it a case of limited application although the *Western Live Stock* case (*post*) extended its meaning. For that matter, the *Pacific Telephone* case, upon which the Appellee and the lower Courts relied, came up on a mere demurrer to this Court, and was decided prior to the *Fisher's Blend* case, at the same Term, and cited in the *Fisher's Blend* case. Both cases involved a Washington State Tax law which is identical to the one at Bar, and this Court held it good as to a Telephone Company and illegal as to Radio.

Just prior to the *Fisher's Blend* ruling, a three-judge Court at Tacoma, Washington, in *K.V.L. v. Wash. Tax Com.,* in 12 F.Supp. 49, held on a case, *NOT stipulated,* as to Facts, that the same tax law was illegal.

The present case was argued before the Court of

Appeals who rendered their decision on October 30, 1954 (see Opinion of Court of Appeals, Appendix B). Appellants again call the attention of this Court to a companion case to this one at bar for which Certiorari is also sought simultaneously herewith, to review the judgment of the Court of Appeals in dismissing an appeal from the United States District Court for Hawaii.

Appellants respectfully incorporate herein, with this Court's permission, by reference, all of the assertions in that Petition, as if set forth fully herein.

REASONS FOR GRANTING THE WRIT

1. In *Fisher's Blend Stations Inc. v. State Tax Commission*, 297 U.S. 650, 58 S.Ct. 608, the Court stated on page 610:

> "* * * The essential purposes and indispensible effect of ALL broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission v. Nelson Bond & Mortgage Co.*, 289 U.S. 266, 279, 53 S.Ct. 627, 77 L.Ed. 1166." (Emphasis ours.)

It is noted that the Supreme Court says in the *Fisher's Blend* case, speaking through Mr. Justice Stone in 1936, that "ALL" broadcasting was interstate commerce. The court did not say "a 5,000-watt station"; the court said "*all broadcasting.*" Nor did the Supreme

Court say anything about State Courts being the determinative agents "of the sphere of commercial value of such broadcasting," as the Hawaiian Supreme Court held. Nor, do appellants adopt the view of the Supreme Court of Hawaii or the Court of Appeals that Mr. Justice Stone was referring to "characteristics" of broadcasting, in the latter part of his opinion, as modifying the earlier part where the Supreme Court ruled that "all" broadcasting was interstate commerce. The *Fisher's Blend* case was reaffirmed and *augmented in Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 58 S.Ct. 546, 82 L.ed. 823, which paradoxically enough is a case relied upon by the appellee. Mr. Justice Stone rendered the opinion of the court also in the *Western Live Stock* case on February 28, 1938, and the case was argued on the theory of "multiple burden" taxation. This case involved a suit by a magazine in New Mexico to prevent a gross receipts tax from being assessed on its distribution of magazines and the magazine publisher (appellant) relied upon the *Fisher's Blend* case. On page 551, in discussing the *Fisher's Blend* case as applied to the *Western Live Stock* case, Mr. Justice Stone, the same judge who rendered the opinion in the *Fisher's Blend* case, speaking for the court, stated:

> " * * * In this and other ways the case differs from *Fisher's Blend Station, Inc. v. State Tax Comm'n., supra,* on which appellants rely. There the exaction was a privilege tax laid upon the *occupation of broadcasting,* which the court held was *itself* interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from

that commerce. *If broadcasting could be taxed, so also could reception. Station WBT, Inc. v. Poulnot,* D.C., 46 F.(2d) 671." (Emphasis ours.)

"Great Britain levies an annual license tax on radio receiving apparatus.

" * * * In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed."

Thus the Supreme Court augmented its prior holding and brought the *Fisher's Blend* case into the "multiple burden" rule, a defense for appellant in this case. There is a noticeable absence of this later statement by Justice Stone in the State Court rulings relied on by appellees (Arkansas and New Mexico decisions, *post*). We repeat what the court said: "*if broadcasting could be taxed, so also could reception.*"

The fact that reception is not taxed does not make the tax as to broadcasting valid. Each is essential to the other. The *mere possibility* that reception could be so taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. At this time, we call attention to the fact that Mr. Justice Stone did NOT cite the *Fisher's Blend* case in the *Western Live Stock* case as a case *of limited application,* or as one confined to a "*stipulated set of facts,*" as does appellee and the Court of Appeals.

As far as "stipulating" the facts are concerned in the *Fisher's Blend* case (*supra*), the *Pacific Telephone* case (*supra*) relied on by appellee, was also decided by this Court upon a mere demurrer to the complaint. (See original Briefs, *Pacific Telephone v. City of Seattle,* No. 364, Supreme Court)

Just *before* the Supreme Court ruled in the *Fisher's Blend* case, on a "5000 Watt Station's " complaint (same as appellants' power), a three-judge statutory court, sitting at Tacoma, ruled the same statute (struck down in *Fisher's Blend* case) was invalid as to a 250 Watt Station, and *the Fisher's Blend case cited this case,* namely, *KVL v. State Tax Commission,* 12 F. Supp. 49.

Hence, the "laboring" of the point that the *Fisher's Blend* case was on a stipulated set of facts, is dispelled not only by its augmentation in the *Western Live Stock* case (*supra*) and the foregoing indisputable facts.

The Supreme Court has held many times that the question of whether a field has been pre-empted by the Congress to the exclusion of any concern by the states, turns upon the *sensitivity* of the field so pre-empted. The complaint, appellants' exhibits, and all the evidence clearly showed that there is no commerce as sensitive in the modern world as radio. The *ether must* be *owned* by the public. It is incapable of being owned privately.

The license granted to appellants (Exhibit "E") expressly excludes the licensee from claiming *any property right* in the use of any particular frequency "or of the ether."

For a history of radio broadcasting before the Supreme Court see *National Broadcasting Company v. Federal Communications Commission,* 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344, which held that the Federal Communications Commission was more than a "mere policing organization."

The case of *Dumont Lab. v. Carroll,* 84 F.Supp. 813 (Penna., D.C.) (Aff'md. Cir. Ct. of App., Penna.) 184 F.(2d) 153 (Cert. to this court denied) in striking down censorship of television films by the State of Pennsylvania, held:

> "I am satisfied that in the field of television there has been a plenary exercised by Congress of the power to regulate and a complete occupation of the field, including censorship. Under the comprehensive scheme of regulation established by the Communications Act, the Commission can exercise effective control over the content of programs, and the fact that this scheme eliminates one particular method of control, namely, censorship in advance of showing, in favor of a less drastic one does not mean that that field is left untouched."

Congress pre-empted the "financial" aspects of a radio station's existence by affirmatively writing the word "financial" in the statute. The Federal control on the subject was so complete that even had Congress not used the word "financial," the mere silence of Congress on the subject would have amounted to a prohibition of a state to have considered the "economic" or "financial" aspects of a radio station. Congress affirmatively used the word "financial" and the Federal Communications Commission concerns itself with the "economic" and "financial" aspects of a station, under the Act of Congress. The Commission will only let a station earn 70% of its potential. All other businesses can earn 100%. But not radio. It must *give* 30% of its time to the public interest without charge probably "in lieu of taxes." That can be the only meaning to this hard and fast rule of the Communications Commission.

Therefore radio has only 70% of its earning potential left. The Territory seeks to whittle that down. Congress was ahead of the Territory, however, and pre-empted the "financial" aspects of radio. State taxes affect the "economic" and "financial" aspects of a station; therefore a state must give way to a superior Federal control on the subject matter.

The Federal Communications Commission in March, 1946, issued its "Blue Book" (Exhibit G) wherein the Federal Communications Commission declared its jurisdiction over the "Economic Aspects" of a broadcast licensee. "Economic Aspects" include "financial" (Act of Congress includes the word "financial") aspects (See Complaint).

The Supreme Court held in 1940 that "financial qualifications to operate a proposed station" was an important element of "public interest requirements." See *F.C.C. v. Sanders Bros.*, 309 U.S. 470, 60 S.Ct. 693, 84 L.ed. 869. Also, "economic injury," in *Colorado Radio v. F.C.C.* (1941) 118 F.(2d) 24, to a radio broadcasting station licensee was held relevant on the issue of public interest as to whether a license should be granted. To the same effect, see *Heitmeyer v. F.C.C.* (1938) 95 F.2d) 91; *Stuart v. F.C.C.* (1939) 105 F.(2d) 788. See *Saginaw Broadcasting v. F.C.C.* (1938) 96 F. (2d) 554 (Cert. denied, 59 S.Ct. 72) where it was held to be a duty of the F.C.C. to make a finding of adequate financial support as a basis of granting a license. Thus, it is clear that the subject of "finances" has been assumed by the Commission, to the exclusion of a state, especially a Territory of archaic and feudal tendencies

where the "winning" lawyers write the "decisions" of its courts, if one can call them judicial "decisions."

However, in spite of the foregoing assumption of control by the Federal Communications Commission of the "Economic Aspects" of radio licenses; and, in spite of laws and decisions of the Federal Courts (*supra* and *post*), the States of Arkansas and New Mexico in *Beard v. Vinsonhaler* (1949) 221 S.W.(2d) 3, and *Albuquerque Broadcasting Co. v. Revenue* (1950) 215 P.(2d) 819, decided flat license fees were valid. Attempt was made in New Mexico to appeal to a Three-Judge Federal Court, but the Federal Court, while holding radio was interstate commerce, was thwarted by complainants prior action in submitting to state jurisdiction and the Johnson Act (Section 1341, 28 U.S.C.A.) was held to prohibit that court from granting relief. (Contrary—*Cromwell* case, 66 S.Ct. 445)

Mere denials by the Supreme Court of appeals from these decisions are now considered by the Court of Appeals as having overruled the *Fisher's Blend,* the *KVL, NBC,* and *Western Live Stock* cases (*supra* and *post*), which assumption is contrary to a recent decision of this Court in *Railway Express Agency v. Virginia,* 347 U.S. 359, 174 S.Ct. 558.

If the Court has doubt that a uniform national system of control over radio, precluding any state taxes whatsoever on the subject matter, was not the intention of Congress, then such a declaration should be made forthrightly. If the "Government does NOT "own" the *ether* above its domain, who does? No tax should ever be allowed to be collected under the guise

of innuendo, indirection, confusion, or misinterpretation. Such lead to legal indignity. These "economic aspects" must be cleared up (See *Dumont v. Carroll,* 184 F.(2d) 153). For, if the states can tax at all, the present tax of two and one-half per cent can be raised to ten per cent and thus will be accomplished the second "breakdown" in communications, which Congress intended should never happen in 1934.

2. All local sales, "services," "activities" and "instrumentalities" of appellant exist solely for the single purpose of projecting its final act—its signal—into space. Without this *final* act, all prior acts and activities of appellant would be useless. Conversely, without the *prior acts* (*i.e.,* sales, services, instrumentalities, etc.), the final act—the projection of appellant's signal into space—could not be accomplished. Thus, as defined by the Communications Act, appellant's activities are all inextricably interstate, regardless of an incidence or so of local activity. All activities of appellants are inseparable from its purpose for existence—namely, to broadcast.

Radio broadcasting consists of *three* indispensible elements, namely, (1) *the transmitter,* (2) the connecting medium, or *the ether,* and (3) *a receiving set.* A loss of any one of the three and you have nothing. Each is indispensible to the other. Thus *the transmitter* (1) is so essentially a part of (2) the connecting medium or *the ether* and (3) *the receiving set,* that you could not have broadcasting without reception or the connecting medium, the ether. All local activities, such as sales, programming, etc., are defined in Section 153, Title 47,

U.S.C.A., as "*instrumentalities, facilities, and services incidental to such transmission.*"

Application of cases dealing with taxes upon express companies, railroads, sleeping cars, telegraph companies or the production of electric power are inapplicable to the case at Bar.

This tax is not really a tax upon the "business" of broadcasting. It is a tax upon its "operations" and "services incidental to such transmission." There is a distinction between the two for Congress has preempted the subject matter of a station's "operations," and "services incidental to such transmission" even though the "business" is "private." Also, the F.C.C. says the "business" of a radio station can *only* earn 70% of its potential (*supra*).

There is a substantial federal question involved in *this* petition. In *Beard v. Vinsonhaler,* 338 U.S. 863, where an appeal was dismissed, there was a *license tax* of only a few dollars involved. Obviously, there was no substantial federal question. In this case at Bar there are substantial federal questions, *i.e.,* (1) a tax on "operations" and "services incidental to such transmission" and not just a business tax, (2) a conflict, whereby the territorial courts state that it and other state courts now have the right to determine as to which radio station is engaged in interstate commerce or is not, depending upon the extent to which its signal is "commercially receivable," as opposed to the duty of the F.C.C. to "classify stations" by law.

If appellants are not in interstate commerce, as measured by the intensity of its signal, then it follows that the F.C.C. should not concern itself with appel-

lants' business. The Hawaiian Supreme Court held in this case that the Territories and States will determine as to which radio station *is or is not* in interstate commerce. The Court stated:

> "Upon such premise, we hold that neither distance at which emanations are receivable, nor classification for control and regulation, but the sphere of actual commercial value, is the criterion for determination of whether broadcasting is 'intrastate,' or 'interstate,' and accordingly is within or without the purview of the 'Commerce Clause' and the scope of exercised federal power thereunder otherwise than for control and regulation."

In *National Broadcasting Co. v. United States* (*supra*), the Supreme Court took a different view:

> " * * * The Commission's licensing function cannot be discharged, therefore, merely by finding that there *are no technological objections to the granting of a license.* If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? * * *
>
> " * * * The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all of the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers *to promote* and *realize* the vast potentialities of radio. * * *
>
> " * * * These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more

effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority. * * *

" * * * In the contex of the developing problems to which it was directed, the Act gave the Commission not niggardly but *expansive* powers. It was given *a comprehensive mandate* to 'encourage the larger and more effective use of radio in the public interest,' if need be, by making 'special regulations applicable to radio stations engaged in chain broadcasting.' " (Italics ours)

The Supreme Court of Hawaii, has in effect found now that state legislatures and state courts should ignore the distance at which emanations are "receivable" and "classification (by the F.C.C.) for control and regulation," and should establish their own "criterion for determining of whether broadcasting is 'intrastate' or 'interstate'." The "advice" of the Supreme Court of the United States in the *National Broadcasting* case (*supra*) can now be dispensed with according to this decision. The Hawaiian Supreme Court has now held that the States (and Territories with the "winning" lawyers writing the decisions, of course) will handle the technological as well as the other criteria which Congress thought it endowed the F.C.C. to do and of which the Supreme Court of the United States spoke in the *National Broadcasting* case (*supra*).

A few words of the late Mr. Justice Jackson are apropos. In the case of *Northwest Airlines v. Minnesota,* 322 U.S. 292, 64 S.Ct. 950, 88 L.ed. 1283, wherein he concurred with the majority in confining a state tax on personal property of an airline to that state (Later overruled, and turning on the question of "regulation"

as opposed to "ownership" of the air), the late Mr. Justice Jackson said:

> "Congress has recognized the National responsibility for regulating air commerce. Federal control is intensive and exclusive. *Planes do not wander about in the sky like vagrant clouds.*" (Italics ours)

Nor are radio signals aimlessly propagated, no matter the wattage. The intensity of the Federal control, and the sensitivity thereof, should now be clarified because of the conflicting opinions of these lower courts.

3. The decision of the Hawaiian Supreme Court and the Court of Appeals decision, to the effect that states may now decide which station is or is not in interstate commerce, depending on its "sphere of actual commercial value" is tantamount to a "classification" of a radio station, and in conflict with the following Act:

Title 47, U.S.C.A. Section 303:

> " 'Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> " '(a) *Classify* radio stations;
>
> " '(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
>
> * * *
>
> " '(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * ;
>
> " '(g) Study new uses for radio, provide for experimental uses of frequencies, and generally en-

courage the larger and more effective use of radio in the public interest;

* * *

" '(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * *

" '(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * * ." (Italics ours)

4. The lower court decisions placing the "commercial sphere" or frankly, the "advertiser" foremost and ahead of the "listening public," conflicts with a basic Ruling of the Federal Communications Commission (1928) and reported on page 14, Public Service Responsibility of Broadcast Licensees, March 7, *1946,* as follows:

> "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasters are not given these great privileges by the United States Government for the *primary benefit* of advertisers. *Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.*" (Emphasis in original.)

The Federal Communications Commission is not just interested in "policing" or "regulation" as the governmental agency regulating airlines.

> *"The Communications Act did not create new private rights."* (Italics ours)
>
> *Scripps Howard v. F.C.C.,* 316 U.S. 4, 62 S.Ct. 875, 86 L.ed. 1229.

"A licensed broadcasting station must operate in the public interest and is a *trustee* for the public." (Italics ours)

McIntire v. Penna. Broadcasting, 151 F.(2d) 597.

5. The Hawaiian tax law is a discriminatory one and in violation of the United States Constitution. Discrimination practiced against citizens, whether as to race, or on a mundane matter of taxes, or no matter how practiced, is odious.

A 50,000 watt station in the United States or in Honolulu, under the philosophy of the lower courts' decisions, are now free of any taxation. No *advertiser* would *dare* testify that he wanted *only* a local audience. Thus, stations are to be 'classified" by "persons" and their "testimony" instead of by law.

On page 5 of the Court of Appeal's decision, the court cites the case of *McGoldrick v. Burwind-White Co.,* 309 U.S. 33, as upholding a state tax on net income wholly derived from interstate commerce. The Court of Appeals emphasizes and underlines the following phrase in said decision, "*non-discriminatory* taxation of the instrumentalities of interstate commerce is prohibited."

The mere possibility of the existence of discrimination is sufficient to declare this law invalid, as in the prohibition against "multiple burden" taxation. The mere possibility that "multiple burden" taxation exists is sufficient to hold a tax invalid (See *Joseph v. Carter and Weekes,* 330 U.S. 422, 67 S.Ct. 815, 91 L.ed. 993 (1947)).

6. The *ether* is unlike the airways, where the owners of land may be held to have some rights to the air over which airplanes fly. (See recent case of *Braniff Airways v. Nebraska,* 347 U.S. 590, 74 S.Ct. 757, where this Court said the C.A.A.'s regulatory powers were *not* bottomed on *ownership* of the air.) However, this indispensable element of broadcasting, namely, the "ether," has to be *owned* exclusively by the Sovereigns. It has to be. World conferences are held, to which the United States and all nations are signatories, to allocate radio frequencies among themselves to avoid international confusion. Radio waves know no frontiers. The *ether,* or space in which radio signals travel, is incapable of private ownership. However, no such international conferences or agreements are needed for airplanes. The appellants' frequency *must* be filed in Switzerland. That is *not* true of Braniff Airways.

The lower trial court stated in its brief oral decision before Counsel for Appellee "wrote and polished it up":

> "And, of course, on the mainland, where state boundaries are very close, it is impossible to say in many instances that it (radio) is not interstate commerce. Examples have been referred to, such as a radio station in Spokane or Coeur d'Alene, a radio station in El Paso, near the Mexican border, a radio station at Yuma, between California and the Arizona border, and you could make any number of such examples."

7. The Court of Appeals' decision on page 3, Appendix "B", setting forth the Findings from 1 to 11, inclusive, is replete with the phrases "commercial

coverage" and "time buyers," but there is an appalling and a noticeable lack of such phrases as "public interest," and the words, "convenience" and "necessity." Nor is there any mention of the philosophy or reasoning behind Sec. 301, Title 47 U.S.C.A., which states as follows:

Title 47, U.S.C.A. Sec. 301:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof, by persons* for limited period of time, under licenses granted by Federal authority, and no such license shall be construed to create *any right,* beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to

any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State: or (e) upon any vessel or aicraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

8. The Supreme Court augmented and brought the *Fisher's Blend* case (*supra*) into the "multiple burden" rule. There is a noticeable absence of this part of this case's entire philosophy in the decision of the Court of Appeals and the State Court rulings relied on by appellee (Arkansas and New Mexico decisions—*supra*).

We repeat what the Supreme Court said "*if broadcasting could be taxed, so also could reception*" (*Western Live Stock* case, *supra*). This was *not* a limited statement confined to stipulated facts. The fact that reception is not taxed, however, does not make the tax on broadcasting valid. The *mere possibility* that reception could be taxed is sufficient to render the Hawaiian law on broadcasting invalid under the "multiple burden" rule. For, without one, you could not have the other.

In the case of *Joseph v. Carter and Weekes*, 330 U.S. 422, 67 S.Ct. 815, 91 L.ed. 993 (1947), a gross receipts tax was declared invalid although the possibility of

"multiple burden" taxation did not in fact exist. The tax in the *Carter-Weekes* case arose out of a local excise tax law of the City of New York imposing a two per cent excise tax on the business of stevedoring; that is, loading and unloading of ships, in a New York harbor. The City of New York contended the taxable activity, as the appellee in the case at bar contends the activity of radio, was a local activity of loading and unloading of ships, and the taxable event was so completely disjointed from the actual commerce as to characterize it as an intra-state activity. That is exactly the position the appellee in the case at bar takes with relation to broadcasting. Appellee states that broadcasting in Hawaii is purely an intra-territorial activity and that reception is a mere incident thereto, whether far or near and depending on "the commercial value," not the intensity of the signal, the criteria under which a station is licensed by the F.C.C. This contention is made despite the fact Hawaii is encompassed by the Act (see *post* and *supra*); and not withstanding, every taxicab, or small boat that has a transmitter must obtain a F.C.C. license to use and operate such.

The Supreme Court of the United States (1947) disagreed with New York City and held that the activity of stevedoring was so essentially a part of the commerce itself that the tax was illegal.

In other words, the court reasoned that "if a ship is loaded, it must be unloaded," so to speak. This Court did not say that the "commercial value" (whether loading or unloading scrap steel or diamonds) was the "criteria" for determining whether the activity was

intra-state or *interstate* commerce, as did the Hawaiian Supreme Court. Broadcasting is akin to "shiploading" —if "intelligence is broadcast, it has to be received," somewhere—far or near, regardless of its value. The court stated:

> " * * * Stevedoring, we conclude, is essentially a part of the commerce itself and, therefore, a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by these gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company. 'What makes the tax invalid is the fact that there is interference by a state with the freedom of interstate commerce.' *Freeman v. Hewit, supra*, 329 U.S. 249, 256, 67 S.Ct. 274, 279. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effect of state legislation and its actual or probable consequences. Not only does it follow a line of precedence outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus, in port cities or transportation or handling centers, without discrimination against outstate as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

9. The case at Bar should have been decided as a matter of law, in favor of appellants. The evidence and exhibits showing the radio spectrum of the world, as allocated by the World Conference, with sufficient other exhibits were attached to the complaint. There were no facts capable of dispute in this case as is indicated by even a glance at the pleadings. That is—until appellee saw a chance to create fictional "facts," by hoping for a limited interpretation by this Court of the *Fisher's Blend* case (*supra*) through seizing on the vague point that the "facts" in that case were "stipulated," and ignoring its broader interpretation in the *Western Live Stock* case (*supra*). Should the Supreme Court of the United States sustain a territorial court in "classifying" radio stations, such a ruling will cause untold confusion and will be in conflict with Sec. 301 (a), Title 47, U.S.C.A.

National Broadcasting Company v. Federal Communications Commission (*supra*) (the "chain broadcasting decision") a case of monumental proportions, was decided on a motion for summary judgment. This case at Bar could have been disposed of as a matter of law. There were no real disputed facts. The "facts" belatedly conjured by appellee were brought forth only to attempt to distinguish the *Fisher's Blend* case. In the *Western Live Stock* case (*supra*), where the *Fisher's Blend* case was reaffirmed, with new vigor, nothing was said about "stipulated facts" limiting its application.

The complaint filed by appellants was extensive and fully supported by affidavits (See Complaint, Tr. 3 to 30). Appellants' license from the Federal Communi-

cations Commission is one for a limited period of time. The conditions precedent to such a grant were set forth in the complaint (Tr. 3 to 23) and such conditions precedent are so many and varied (including *financial, technical* and *character* qualifications), and the regulations of the Federal Communications Commission are so *sensitive,* that the complaint alleged that states and territories could not concern themselves in any way whatsoever with legislation in the field of radio communication, or, with any part of its operations (Tr. 3 to 23).

10. Both parties stipulated (See Stipulation in Appendix "A") that all the exhibits and the Transcript of Testimony should be brought up from the Hawaiian Supreme Court pursuant to Rule 11, Court of Appeals' Rules for the Ninth Circuit, at the time this appeal was made. At the argument before the Court of Appeals it was brought out and demonstrated to the court that three bound, legible copies of the Transcript of Testimony before the trial court were there before the Court of Appeals, together with all the exhibits and evidence.

Just how the Court of Appeals can say, as they did, on page 4, "While the appellants have challenged the findings in many respects, they *have not brought up any of the evidence.*"—is beyond your Petitioners' comprehension. It was there, but was not used.

11.(a) This court has often held that fair play is the essence of "due process" under the United States Constitution. In fact, that statement appeared in the recent case of *Galvan v. Press,* 347 U.S. 522, 74 S.Ct. 737.

There is nothing "fair" about the "prevailing lawyer" writing the decision of a judge. It is offensive to all those inheritors of the Magna Charta. It is a practice as silly and absurd today, and as needless, as the mediaeval system of trial by combat. No glibness of tongue, oratory, or *any excuses* can justify one of the advocates having *anything* to do with writing a trial judge's opinion. Appellee's counsel did not just submit proposed Findings of Fact and Conclusions of Law. Appellee's counsel *wrote* the decision of the judge and appellee's counsel did it "bare faced" and without any apology.

As this court has stated, "due process is of the essence of fair play." There is nothing "fair" about this kind of practice. It is nefarious, utterly and intellectually indigestible, and is not "due process."

11.(b) There is no provision for *returning* penalties under this tax law in the territorial statutes. Likewise, there is no statutory provision for paying the *tax without the penalties being added thereto.* In fact, the penalty by Hawaiian law, becomes an Hawaiian "realization." The Treasurer of the Territory, if penalties are paid in advance of suit, and as they must be under these fondly described "remedies" by appellee, is prohibited by Secs. 5535 and 5219, Hawaiian Laws, from *repayment* or *refunding.* True, Sec. 1575 of Hawaiian Laws provides that a payment may be made to a "public accountant," not *a court,* but actually to *the Territorial Collector,* and thus to the Territory itself. That is the way it was paid in the case at Bar. But, the *later* Secs. 5535 and 5219 govern the *repayment*

of such taxes if the taxpayer wins and one can only recover the 'income" and not the penalties, and such are not remedies at all but are legal "snares."

The Hawaiian Treasurer has no right to return the penalties for such become part of the "income" and therefore, if a taxpayer wins, and payment was made under Sec. 1575 Revised Laws of Hawaii, the same "shall become a realization," as set forth in the laws themselves, and the taxpayers' triumph becomes a Pyrrhic victory.

Sec. 5535, Laws of Hawaii, expressly provides:

> "No taxpayer shall be exempt *from delinquent penalties* by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word *'valuation' shall be deemed to refer to the amount of income."* (Emphasis ours)

Sec. 5219, Laws of Hawaii, expressly provides:

> "The tax paid upon the amount of any assessment, actually in dispute and in excess of that admitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, *be held by the treasurer in a special deposit* to await the final determination of the appeal. If the final determination *is in whole* or in part *in favor* of the appealing taxpayer, the treasurer shall *repay to him out of such deposit the amount of the tax paid upon the valuation* [*"Income" only,* not the "penalties," as *"valuation"* is described in Sec. 5535 above] *held by the court to have been excessive or non-taxable. The balance,* if any, or the whole of the deposit, in case the decision is wholly

in favor of the assessor, *shall, upon the final determination, become a "realization" under the tax law concerned."* (Emphasis and note ours)

The "trick" in the above sections is that a "valuation" is described in Sec. 5535 as "income" but when it comes to "refunding" under Sec. 5219, the penalties (now in excess of $25,000.00 in this case) have become a "realization under the tax law concerned." So, win or lose, the Territory cannot help but make some money, so to speak, by merely becoming litigious. These statutes do not provide remedies. They are "a snare," and totally lacking of "due process."

12. The duties of the Federal Communications Commission have been well prescribed by the Congress (Title 47 U.S.C.A., Sec. 151-609). The Commission is authorized to make rules and this court has been very "touchy," with the everlasting gratitude of the American public, about seeing that this great modern phenomena, radio, should not be abused either by private persons or by excessive sovereigns. This court has held that licensees are only the "trustees" for the public. This court has held that no new "private" rights were created by the Communications Act of 1934. The lower courts' decisions proceeded to "classify" radio stations in violation of Sec. 303, Title 47 U.S.C. A territorial court now states that its "classification" of a radio station, namely that "the sphere of actual commercial value is the criterion for determination of whether broadcasting is 'intrastate' or 'interstate'," shall prevail over the prescribed duties of the Federal Communications Commission and the Laws of Congress.

Sec. 301, Title 47 U.S.C.A., specifically states that the transmission of energy from (a) "one place in any Territory—to another place in the same Territory" shall be within the control of the Federal Communications Commission. This statute likewise had no effect upon the lower courts.

CONCLUSION

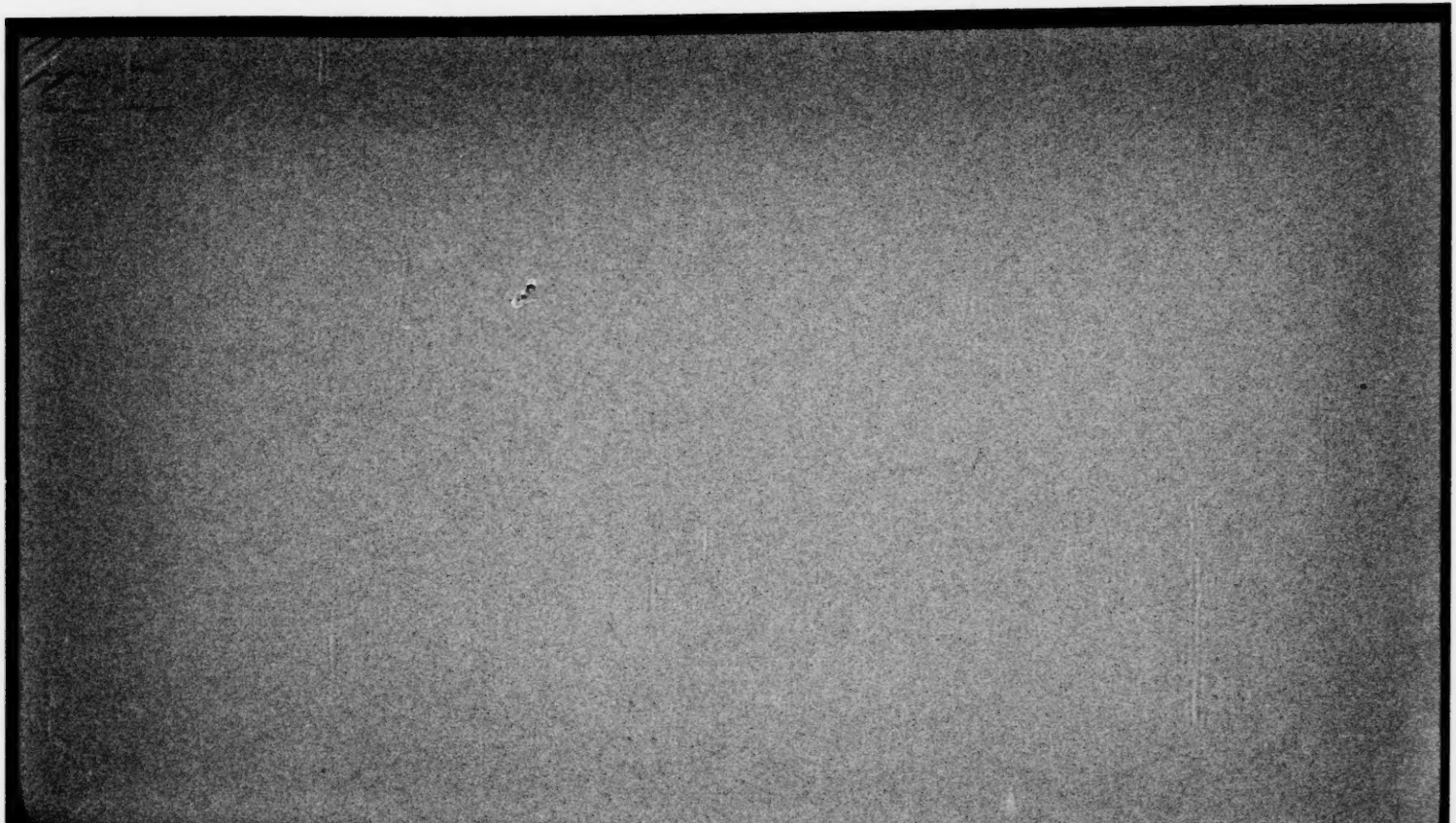
For the foregoing reasons it is respectfully submitted that this Petition for Certiorari should be granted. The case presents issues which are important in the future administration of the Federal Communications Act, to the states, and to the radio industry, and the case is of pressing importance to future governmental rights and duties over the public "properties" in the ether. Last, but of as great importance, is the lack of "due process" in Hawaii, where the "prevailing lawyers" write the judicial opinions, and where tax laws are "snares." A searching inquiry should be made by this Court into these practices.

Respectfully submitted,

KENNETH DAVIS
Attorney for Petitioners.

DAVID INGMAN
Of Counsel.

APPENDICES



APPENDIX A

STATUTORY PROVISIONS, RULES, RULINGS OF THE FEDERAL COMMUNICATIONS COMMISSION AND STIPULATION OF PARTIES

Statutory Provisions

Title 47, U.S.C.A., Sec. 153, Subsection B:

"Section 153. Definitions.

"For the purposes of this chapter, unless the context otherwise requires—

"(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalies, facilities, apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

"(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all *instrumentalities, facilities,* apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) *incidental* to such transmission.

"(d) 'Transmission of energy by radio' or '*radio transmission of energy*' includes both such transmission and all instrumentalities, facilities, *and services incidental* to such transmission.

"(k) 'Radio station' or 'station' means a station equipped to engage in radio communication or *radio transmission of energy.*" (Italics ours)

Title 47, U.S.C.A. Sec. 301:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof, by persons* for limited period of time, under licenses granted by Federal authority, and no such license shall be construed to create *any right,* beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the

jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

Title 47, U.S.C.A. Section 303:

" 'Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

" '(a) Classify radio stations;

" '(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

" '(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * ;

" '(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

" '(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * *

" '(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * * "

Public Service Responsibility of Broadcasting Licensee, Reported by Federal Communications Commission, March 7, 1946

"IV. Economic Aspects—The problem of program

service is intimately related to economic factors. A prosperous broadcasting industry is obviously in a position to render a better program service to the public than an industry which must pinch and scrape to make ends meet. Since the revenues of American Broadcasting come primarily from advertisers, the terms and conditions of program service must not be such as to block the flow of advertising revenues into broadcasting. Finally, the public benefits when the economic foundations of broadcasting are sufficiently firm to insure a flow of new capital into the industry, especially at present when the development of FM and television is imminent."

Rule 10, Rules of the United States Court of Appeals for the Ninth Circuit

"Appeals, Return and Record

"1. In all cases on appeal or review, civil or criminal, the clerk of the trial court or commission shall transmit to the clerk of this court the original files designated by the respective parties as the record on appeal or review."

Stipulation

"No. 2898

"In the Supreme Court of the Territory of Hawaii

J. Elroy McCaw and John D. Keating,
Complainants, Plaintiffs-in-Error,

vs.

The Tax Commissioner of the Territory of Hawaii, Earl W. Fase, *Defendant-in-Error.*

Error to the Circuit Court, First Judicial Circuit, Honorable Willson C. Moore, Fourth Judge, Presiding

Law No. 21340

"STIPULATION

"IT IS HEREBY STIPULATED by and between the parties hereto that the original papers in the Supreme Court of the Territory of Hawaii, including all exhibits and the transcript of evidence, may be sent to the United States Court of Appeals for the Ninth Circuit as the record on appeal in said Court pursuant to the Federal Rules of Civil Procedure, the rules of the United States Court of Appeals for the Ninth Circuit and the rules of the Supreme Court of the Territory of Hawaii; PROVIDED, HOWEVER, that certified copies of the Bond on writ of error and the Bond on Appeal to the United States Court of Appeals for the Ninth Circuit be substituted for the originals.

Dated at Honolulu, Hawaii, this 8th day of June, 1953.

J. ELROY MCCAW and JOHN D. KEATING,
Complainants, Plaintiffs-in-Error,

By DAVID N. INGMAN and KENNETH DAVIS,
Their Attorneys,

By DAVID N. INGMAN

THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, EARL W. FASE,
Defendant, Defendant-in-Error,

By /s/ RHODA V. LEWIS,
RHODA V. LEWIS,
Deputy Attorney General,
Territory of Hawaii.

"SO ORDERED:
EDWARD A. TOWSE,
Chief Justice

{SEAL SUPREME COURT TERRITORY OF HAWAII}

Section 7 (Application for a Radio Broadcasting License):

"Applicant waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of

the previous use of the same, whether by license or otherwise, and requests a station license in accordance with this application."

HAWAIIAN LAWS INVOLVED

"Sec. 5455, Hawaiian Laws, Imposition of Tax. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

* * *

"D. Tax upon theaters, amusements, radio broadcasting stations, etc. Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business."

Section 5535, Laws of Hawaii:

"No taxpayer shall be exempt from delinquent *penalties* by reason of having made an *appeal on* his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in Section 5219, for which purpose the word '*valuation' shall be deemed to refer to the amount of income.*" (Law 1945) (Italics ours)

Section 5219, Laws of Hawaii:

"The tax paid upon the amount of any assessment, actually in dispute and in excess of that ad-

mitted by the taxpayer, and covered by an appeal duly taken, shall, during the pendency of the appeal, be held by the treasurer in a special deposit to await the final determination of the appeal. If the final determination is in whole or in part in favor of the appealing taxpayer, the treasurer shall repay to him out of such deposit the amount of the tax paid upon the *valuation* held by the court to have been *excessive or non-taxable. The balance,* if any, or the whole of the deposit, in case the decision is wholly in favor of the assessor, *shall, upon the final determination, become a realization under the tax law concerned.*" (Italics ours)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*,
vs.
EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.

No. 13,920
Oct. 30, 1954

Appeal from the Supreme Court of the Territory of Hawaii.

Before: DENMAN and ORR, Circuit Judges
YANKWICH, District Judge

YANKWICH, District Judge:

Appellant J. Elroy McCaw is a citizen and resident of Centralia, Washington, and appellant John D. Keating a citizen and resident of Portland, Oregon. In 1946, they obtained a license for a limited term from the Federal Communications Commission to operate a radio station known as KPOA in Honolulu, Territory of Hawaii, under the terms of the Communications Act of 1934, as amended (47 U.S.C., §151-609). The station, a 5000 kilowatt station, commenced broadcasting on October 15, 1946.

On May 3, 1951, the appellants filed in Law in the Circuit Court, First Judicial Circuit, Territory of Hawaii, an amended complaint in a suit brought under Section 1575 of the Revised Laws of Hawaii, 1945, to recover the sum of $7,637.33 paid under protest on March 21, 1951. It is conceded that the suit was begun within the period of thirty days after the protested payment, as required by Section 1575.

The amended complaint alleged that the taxes paid

under protest were assessed under Chapter 101 of the Revised Law of Hawaii, 1945, upon the gross receipts from radio broadcasting by station KPOA, Honolulu, owned and operated by the appellants, which it challenged as unconstitutional and invalid.

The appellants are a co-partnership registered as such under the laws of the Territory of Hawaii and doing business under the name of "Island Broadcasting Company."

On June 11, 1946, the partnership obtained a license under Section 5451 of Chapter 101 of the Revised Laws of Hawaii, 1945, known as the "general excise tax" or "gross income" tax law, and for the period beginning October 1, 1946, and ending November 30, 1947, the partnership returned for taxation its broadcasting income, and paid the tax on it. For December, 1947, and thereafter, while continuing to report income from broadcasting, the partnership claimed exemption of all such income upon the ground that it was derived from interstate commerce.

It is the appellants' contention in this litigation that *all* broadcasting is interstate commerce, that Congress had preempted the subject matter of radio broadcasting to the exclusion of state and territorial legislation of every kind, including taxation, and that the assessments made by the Tax Commissioner were unconstitutional and invalid. The Tax Commissioner, in his answer, asserted in substance that the gross receipts assessed for taxation were derived from the transmission of KPOA broadcasts to the radio audience in the Territory of Hawaii, that KPOA does not reach an audience outside the Territory of Hawaii with effective and satisfactory service that is of commercial value in the sale of radio time, that sponsors purchasing radio time on KPOA do not do so with a view of reaching an audience outside the Territory of Hawaii, that where sponsors

have occasion to reach an audience outside the Territory, a short-wave relay is employed, and that the Tax Commissioner excluded from the tax assessments all the receipts from the programs transmitted by short-wave relay. In a counterclaim, the additional sum of $14,595.98, in accrued taxes with interest was sought.

The cause was tried without a jury. Findings were entered on January 28, 1952, the court making twelve specific findings, of which the following are the most important:

"1. Insofar as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage.

"2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-territory audience.

"3. Where a KPOA broadcast is directed to an out-of-the-territory audience a short wave relay is used, as in the case of the program 'Hawaii Calls.'

"4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by short wave relay or brought into the Territory by short wave relay.

"8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

"9. The radio audience outside the Territory of Hawaii is not a factor in the selling or buying of radio time on station KPOA, where no short wave relay is employed.

"11. The territorial tax law has been and is properly interpreted and applied by the Tax Com-

missioner and the tax law and assessments made thereunder are valid."

On the basis of these findings the Court concluded that the plaintiff was not entitled to recover the taxes paid and gave judgment to the Tax Commissioner on his counter-claim.

Torkel Westley, who was the Tax Commissioner before the case arose, was replaced in office by Earl W. Fase. On writ of error to the Supreme Court of the Territory of Hawaii, the judgment was affirmed in *McCaw v. Fase,* 40 Haw. 121, the Court holding that the findings are sustained by the evidence and that the tax did not have any of the constitutional infirmities urged by the appellants. The Supreme Court held that the trial court had found

> "from the evidence—as we do, likewise—that assessment of the Territory's gross income tax involved was restricted to receipts of KPOA from the latter's local business, to-wit, that which had commercial value only within and not without the Territory of Hawaii." (*McCaw v. Fase, supra,* at p. 172)

The Supreme Court also concurred in the finding of the trial court that the radio broadcasting, by KPOA on its standard wave, was

> "for other than control and regulation, such as had commercial significance and value only within the Territory of Hawaii, or 'intrastate'." (p. 172)

This is a direct appeal from the decision. (28 U.S.C., §1293)

While the appellants have challenged the findings in many respects, they have not brought up any of the evidence. In the circumstances, the presumption of correctness of the findings under Rule 52(a) of the Federal Rules of Civil Procedure, applies with great

strictness. *Richard v. Thompson,* 9 Cir., 1934, 72 F(2) 807, 809; *United States v. Van Dusen,* 8 Cir., 1935, 78 F(2) 121, 122; *Gallagher's Steakhouse v. Bowles,* 2 Cir., 1944, 142 F(2) 530, 531. However, in reality, the appellants are contending that it appears from the pleadings themselves that the tax to which they are subjected is a burden on interstate commerce and not within the power of the Territory of Hawaii to exact. The statute involved is one imposing a tax upon sales, services and, in general, all types of business in the Territory measured by gross receipts. The portion material to this cause reads:

> "§5455. Imposition of Tax. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:
>
> * * *
>
> "D. Tax upon theaters, amusements, radio, broadcasting stations, etc. Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business." (Revised Laws of Hawaii, 1945, Chapt. 101, §5455)

It cannot be disputed that the legislature of Hawaii may levy an excise tax. *Brodhead v. Borthwick,* 9 Cir., 1949, 174 F(2) 21. The question to determine is whether the tax burdens interstate commerce. The control of the Congress over interstate commerce is absolute. *U.S. Constitution,* Art. 1, §8, Cl. 3. So any direct inter-

ference with it by any State must give way. The Supreme Court has summed up the primacy of this power in the sentence:

> "This power over commerce when it exists is complete and perfect." *United States v. Rock Royal Coop., Inc.*, 1939, 307 U.S. 533, 569.

But the same Court has stated that

> " * * * It was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau, 303 U.S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. A tax may be levied on net income wholly derived from interstate commerce. *Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited.* The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded." *McGoldrick v. Berwind-White Co.*, 1940, 309 U.S. 33, 45 (Emphasis added)

So it is evident that there is a wide area in which the state may exercise its taxing power. And this includes even instrumentalities of interstate commerce. This has been an accepted principle since *Cooley v. Howard,*

1851, 12 How. 298 was decided. Ever since, state taxes on instrumentalities of interstate commerce have been sustained. We consider some illustrative cases showing the variety of tax statutes upheld over the course of years.

Statutes taxing the property of express companies. *Pacific Company v. Seibert,* 1892, 142 U.S. 339; *Postal Telegraph Cable Co. v. Charleston,* 1894, 153 U.S. 692; *Osborne v. Florida,* 1897, 164 U.S. 650; *Adams Express Co. v. Ohio,* 1897, 165 U.S. 194; *Williams v. City of Talladega,* 1912, 226 U.S. 404; *Wells Fargo & Co. v. Nevada,* 1918, 248 U.S. 154.

Statutes taxing the property or the receipts from the operations of the property of a railroad. *New York Central Railroad v. Miller,* 1906, 202 U.S. 584; *St. Louis & East St. Louis Electric Ry. Co. v. Hagerman,* 1921, 256, U.S. 314; *Southern Ry. Co. v. Watts,* 1923, 260 U.S. 519; *Western Maryland Railway Co. v. Rogan,* 1951, 340 U.S. 520.

A tax on sleeping cars. *Pullman Company v. Adams,* 1903, 189 U.S. 420.

A tax on sale and production of electric power. *Broad River Power Co. v. Query,* 1933, 288 U.S. 178.

Similarly, the courts have sustained consistently taxes upon property destined for interstate commerce either before it leaves the State or after it reaches it. Illustrative is *Heisler v. Thompson Colliery Co.,* 1922, 260 U.S. 245, in which Pennsylvania subjected every ton of anthracite coal mined "washed, screened, or otherwise prepared for market" in the State to a one and one-half per cent tax of its value when prepared for market to be assessed after it is prepared as indicated and is "ready for shipment or market." (*Penn. Laws,* 1921, page 479, 72 P.S. Pa. §2501) And more recently, courts have sustained a tax on local adver-

tising levied on publishers of newspapers and magazines, *Western Live Stock v. Bureau of Revenue,* 1938, 303 U.S. 250, and have permitted the application of a personal property tax on the entire fleet of airplanes of an airplane company, despite the fact that the planes, while home-based in the State, were in and out of the State during the year, none of them being continuously without the State during the whole tax year. *Northwest Air Lines, Inc. v. Minnesota,* 1944, 322 U.S. 292. Various state "use-taxing" statutes have been upheld. *Henneford v. Silas Mason Co.,* 1937, 200 U.S. 577; *Felt & Tarrant Mfg. Co. v. Gallagher,* 1939, 306 U.S. 62; *Southern Pacific Co. v. Gallagher,* 1939, 306 U.S. 169; *Pacific Telephone & Telegraph Co. v. Gallagher,* 1939, 306 U.S. 182; *Alabama v. Key & Boozer,* 1941, 314 U.S. 1; *Curry v. United States,* 1941, 314 U.S. 14. And see, *California v. Thompson,* 1951, 313 U.S. 109 (regulating solicitation of business for interstate carriers); *Brown v. Parker,* 1943, 317 U.S. 341 (Conceding to the states tax power to regulate local agricultural products destined for interstate commerce before they reach such commerce). And even where the same instrumentalities are used in inter and intrastate commerce, a tax on the local business based upon the gross income has been sustained. *Pacific Telephone & Telegraph Co. v. Tax Commissioner,* 1936, 297 U.S. 403. There, as here, there was no proof offered that the tax did, in fact, burden interstate commerce. *McCaw v. Fase,* 40 Haw. 97, 156. Reliance was on the fact that the intra and interstate business were so interwoven that the tax on gross receipts against telegraph companies and railroads admittedly engaged in interstate commerce was, of necessity, a burden on interstate commerce. The court rejected the contention in an opinion written by Mr. Justice Brandeis, in which, speaking for the unanimous court, he wrote:

"Taxes for the privilege of doing local business measured by the gross income of such business have frequently been laid upon concerns engaged in both intrastate and interstate business; and have, for half a century, been sustained without enquiry whether withdrawal from the local business would compel discontinuance of the interstate. That an occupation tax upon a foreign telegraph company measured by earnings from its local business is valid, was indicated as early as Telegraph Co. v. Texas, 105 U.S. 460, 464-465; and was definitely held in Ratterman v. Western Union Telegraph Co., 127 U.S. 411, which has been repeatedly cited with approval in cases involving interstate railroads and telegraph companies. Similarly, in Southern Ry. Co. v. Watts, 260 U.S. 519, 529-530, a so-called franchise tax for the privilege of doing intrastate business, measured by a percentage of the value of property subject also to an *ad valorem* tax, was sustained as against both foreign and domestic railroads.

"*No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable.*" (page 415) (Emphasis added)

This case has decisive significance because it was decided at the same term as the decision on which the appellants rely chiefly, *Fisher's Blend Stations, Inc. v. State Tax Commission,* 1936, 297 U.S. 650. That decision was upon a demurrer to the complaint. The parties stipulated that the case might be submitted upon the facts recited in the complaint. The complaint showed that the State of Washington had imposed a tax on the gross receipts derived from broadcasting.

(Chapt. 191, §2, Wash. Laws of 1933). The allegations of the complaint indicated that the station broadcasted within the "Fifth Zone" comprising eleven western and northwestern states, including Washington and the Territories of Alaska and Hawaii, it being licensed as a clear channel station, a station to which the opinion says:

> " * * * the Commission has assigned a radio frequency to be used at such times and with such power as will enable it to broadcast throughout the United States without interference by other stations." (p. 652)

The Court held that, as the income was derived from interstate commerce and there was nothing in the complaint to show that an attempt was made to segregate the receipts received from local broadcasts, the tax was invalid. The gist of the opinion is in the following paragraph:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of the type which has long been held to be an unconstitutional burden on interstate commerce, * * * It is enough that the present is not such a tax, but is levied on gross income derived from appellant's entire operations, which include interstate commerce. As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail, Cooney v. Mountain States Tel. & Tel. Co., supra; cf. Pacific Tel. & Tel. Co. v. Washington, supra, and the judgment of the state court must be reversed and the case remanded for further proceedings not inconsistent with this opinion." (p. 655-656)

It can be seen readily that the Hawaii tax is of a different character. The trial court found that the station operates within the Territory and the Supreme

Court of Hawaii, in sustaining the judgment of the trial court, made special reference to the findings and found that any income from short-wave relays was specifically excluded, saying:

> "The tax is upon the business of radio broadcasting 'within this Territory', measured by the gross income of such business. This excludes broadcasts between points in the territory and points outside the Territory. * * * The tax commissioner has assessed the tax accordingly by excluding therefrom receipts of KPOA from short-wave relays being broadcast between points in the Territory and points outside the Territory and by including and thus subjecting to the tax only receipts of the station from its 'standard wave' broadcasts, which latter are of commercial value only within and not outside the Territory." *McCaw v. Fase, supra,* at p. 715

We, therefore, have an authoritative finding by a territorial court approved by the highest court of the Territory which distinctly says that not only the statute itself, but also the practices under it, limit the tax to income from local activities only. Such interpretation must be followed by us. *Osborne v. Florida,* 1897, 164 U.S. 650, 654; *J. Bacon & Sons v. Martin,* 1939, 305 U.S. 380.

It is quite evident that a tax capable of such application is not a burden on commerce. And any general statement in *Fisher's Blend Station, Inc. v. State Tax Commission,* 1936, 297 U.S. 650 as to the nature of radio communication must be restricted to the context of the statute there under consideration and the pleadings under which the case was decided. Granted that the Congress has preempted the radio field, *National Broadcasting Co. v. United States,* 1943, 319 U.S. 190, and that the Communications Act requires federal licensing,

even for stations which operate from one place in any territory to another place in the territory (47 U.S.C. §301), these facts do not make the individual stations agencies of the Government immune from state taxation. *Broad River Power Co. v. Query,* 1933, 288 U.S. 178; *Buckstaff Bathhouse Co. v. McKinley,* 1939, 308 U.S. 358. And the character of radio communication does not prohibit a tax upon the state business any more than the interstate character of railroads, power companies, telephone, telegraph and express companies stands in the way of valid tax statutes of the type under discussion. For such a tax "does not aim to control interstate commerce." *Freeman v. Hewitt,* 1946, 329 U.S. 249, 254.

In *Whitmore v. Bureau of Revenue,* 1946, D.C.N. Mex., 64 F.Supp. 911, affirmed in *Whitmore v. Ormsbee,* 329 U.S. 668, a three-judge court, in dismissing an action involving the New Mexico business privilege tax which levied a tax in an amount equal to two per cent of the gross receipts upon the business of radio broadcasting (§§76-1404 N.Mex. Stats. 1941) stated that broadcasting was both intra and interstate in these words:

> "Plaintiffs are engaged in radio broadcasting; and, while their stations are located in New Mexico, the electro-magnetic waves transmitted from their respective stations cross state lines and their programs are heard by listeners both in New Mexico and in other states. Therefore, the business in which they are engaged is essentially in part intrastate commerce and in part interstate commerce. Fisher's Blend Station v. Tax Commission of State of Washington, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956." (p. 916)

The teaching of these cases is also that measures which partake of regulation are in a different category

from purely taxing measures which have none of the indicia of regulation. A taxing statute may, of course, be an attempt to control the commerce field in which the primacy is that of the federal government. But a tax such as the tax under consideration has no regulatory feature. Its only effect could be the increase of the cost of doing business which has never affected the validity of state taxing statutes. In sum, the arguments advanced by the appellants are adequately answered in one of the latest decisions of the Supreme Court, *City of Chicago v. Willett Co.*, 1953, 344 U.S. 574, in which the court found valid a license tax on trucks operated within the city. It is to be noted that in the main opinion Mr. Justice Frankfurter, who wrote the opinion in the case just cited, interpreted the meaning of the Pacific Telephone and Telegraph case in accordance with the views of the Supreme Court of Hawaii, with which we express agreement:

> "Thus, as regards the main point pressed by respondent, the Chicago tax avoids the infirmity laid bare by the Sprout case, and meets the facts of Osborne v. Florida, supra, and Pullman Co. v. Adams, supra, as did the Pacific Telephone case. Again, as in Pacific Telephone, the taxpayer here makes no showing that the tax, though directed at intrastate business only, in fact burdens interstate commerce. This is for the taxpayer to show affirmatively and respondent has made no attempt to do so.
>
> "But, if it were necessary to decide upon the basis of the 'nice distinctions' urged upon us, we could not rest without more on the authority of Pacific Telephone. For the tax in that case was measured by a percentage of the gross income drawn solely from intrastate business. Although the taxpayer's intrastate and interstate activities were in-

> separable, the tax was not laid inseparably on both. 297 U.S. at 414. That is not true in this case. Here the tax falls inseparably on what have been called instrumentalities of interstate commerce, which are at once also those of intrastate commerce. Whatever intrinsic signficance this difference may have in other situations, it becomes irrelevant in a case controlled, as is this one, by the governing principles of New York Central R. Co. v. Miller, supra." (p. 578)

In the foregoing we have sought to show that federal precedents sustain the view of the Hawaii courts. We did not refer to several decisions in which state courts have sustained taxes on local radio broadcasting where the local business was clearly separable from the interstate business. However, there are such decisions.

Dorsky v. Brown, 1951, 255 Ala. 238, 51 S(2) 360, certiorari denied 342 U.S. 818, in which a state tax on a coin operated radio was held not to violate the commerce clause.

City of Atlanta v. Oglethorpe University, 1934, 178 Ga. 379, 173 S.E. 110, in which a municipal license tax was applied to a college broadcasting station.

WDOD Broadcasting Corp. v. Stokes, 1941, 180 Tenn. 677, 177 S.W.(2) 837, in which a statute of Tennessee levying a tax on gross receipts was applied to a domestic broadcasting company.

Beard v. Vinsonhaler, 1949, 215 Ark. 389, 221 S.W. (2) 3, appeal dismissed, 338 U.S. 896, in which a license tax on the business of radio broadcasting and on persons soliciting advertising for radio was sustained. Interpreting the statute as a valid exercise of the taxing power, the Arkansas court said:

> "/* * * A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local enterprise readily separable from their interstate activity. Should they confine their broadcasts to programs brought in from other states there might be force to their suggestion that interstate commerce is being taxed. But as long as they conduct an essentially intrastate business as well, we see no reason why they should not bear their share of the cost of municipal advantages admittedly received. It is shown that daily newspapers pay an annual tax of $1000, although some of their papers go beyond the State boundaries. The telephone company's tax is $45,000, though its business is interstate as well as intrastate. By comparison the appellees' tax is moderate in amount. It is not even suggested that the sum exceeds the profits derived from local business, so that interstate receipts are to some extent affected." (page 4-5)

A direct appeal was sought to the Supreme Court from this case. This was denied in a *per curiam* decision which bore this very significant legend:

> "The appeal is dismissed for want of a substantial federal question. *Crutcher v. Kentucky,* 141 U.S. 47."

The Judicial Code allows a direct appeal to the Supreme Court "where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity." (28 U.S.C.§ 1257(2))

So the court was bound to entertain the appeal if it felt that the statute violated any constitutional provision. As the court could see no question of violation of the commerce clause in the Arkansas statute, the ap-

peal was dismissed. See, *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 1952, 342 U.S. 35.[1]

It is clear from what precedes that the tax levied by the Legislature of the Territory of Hawaii is a valid and constitutional tax as applied to the local broadcasting business of the appellants and that the Supreme Court of the Territory of Hawaii was correct in sustaining the judgment of the trial territorial court which so held.

The judgment of the Supreme Court of the Territory of Hawaii is therefore affirmed.

(Endorsed:) Opinion. Filed Oct. 30, 1954.

Paul P. O'Brien, Clerk.

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[1]The Kentucky case referred to in the memorandum (*Crutcher v. Kentucky*, 1891, 141 U.S. 47) involved a tax imposed by the legislature upon the agencies of foreign express companies. The statute, in addition to providing for the payment of a license fee, required a showing on the part of the agent of the express company that the company was possessed of an actual capital of at least $150,000.00. The Supreme Court's reference to this case directs attention to a statute which, under the guise of tax, seeks to make what Mr. Justice Frankfurter in *Freeman v. Hewitt*, 1946, 329 U.S. 249, called "a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade." (p. 254) The tax under challenge in the case before us is not of that character.

No. 481

ADDENDA TO PETITION FOR CERTIORARI

Supreme Court of the United States

OCTOBER TERM, 1954

J. ELROY MCCAW and JOHN D. KEATING, *Petitioners*,
vs.
EARL W. FASE, the Tax Commissioner of the Territory of Hawaii, *Respondent*.
No. 481

ADDENDA TO APPENDIX B

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No. 481

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants*, vs. EARL W. FASE, The Tax Commissioner of the Territory of Hawaii, *Appellee*.	No. 13,920

APPEAL from the Supreme Court for the Territory of Hawaii.

THIS CAUSE came on to be heard on the Transcript of of the Record from the Supreme Court for the Territory of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said Supreme Court in this Cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: October 30, 1954,
PAUL P. O'BRIEN, Clerk.

ORAL DECISION OF THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII
AT TERM IN LAW

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*

v.

THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY, *Defendant.*

No. 21340

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST

DECISION

(The Clerk called the case at 11:00 a.m.)

THE CLERK: For decision.

THE COURT: Gentlemen, this is an action by the complainants, McCaw and Keating, to recover gross income taxes levied against their receipts or a portion of their receipts from broadcasting, receipts which were paid under protest, together with some interest and penalties.

The Territory, in responding to the action, has in addition to denying the allegations of the complaint have cross-complained for the amount which was alleged to be due in addition to the amount herein sued for.

The complainants operate a broadcasting station here in the City of Honolulu, commonly known as Station

KPOA, on a wave band of 630 kilocycles with 5,000 watts of power. The business in which they are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission. It is the contention of the complainants that because of the preemption of this field of endeavor by the Federal Communications Commission that any state or territory, and of course in this case, the Territory of Hawaii, has not the right or the power to impose this tax as the regulation of such a business has been preempted and therefore that they are precluded.

Now, the Federal Communications Commission has defined what is an interstate communication. That is Section 3 of the Communications Act of 1934, it being subsection (e), which says, "An interstate communication or transmission means a communication or transmission from any state or territory," and then, leaving out the various things that are not important, "to any other state or territory." And, of course, there has to be a license for any radio station, as provided by Section 301 of the Act, where there is any apparatus operated for the transmission of energy or communication by signals, by radio, from one place in any territory to another place in the same territory or within states or between a state and a foreign country, and things of that kind. So, that particular section just quoted really means that it takes in all forms of radio communication, no matter what they are, whether they be transmission between states or between a station and points right here in Honolulu, or between taxicabs or any sort of a communication of that kind. The only

thing that I understand is excluded from the Act is the governmental transmission.

It has been held in a number of cases upon which the complainants assert their position that radio broadcasting by the very nature of that industry, or whatever we may term it, is in the field of interstate commerce for the reason that once the radio impulse or waves, or whatever you want to call them, are put in motion by broadcasting apparatus that there is no longer any control over the transmission of that signal. And, of course, on the mainland, where state boundaries are very close, it is impossible to say in many instances that it (radio) is not interstate commerce. Examples have been referred to, such as a radio station in Spokane or Coeur d'Alene, a radio station in El Paso, near the Mexican border, a radio station at Yuma, between California and the Arizona border, and you could make any number of such examples.

It is further contended by the complainants that this tax is a burden upon interstate commerce, in which this radio is engaged, and therefore an undue interference with interstate commerce, and therefore that the tax is void.

It is contended, on the other hand, by the Territory that KPOA, when we start to analyze its business and the field in which or the area in which it is involved, that we can go to the licensing and the regulations of the Federal Communications Commission and to a great extent find our answer.

Now, KPOA, it has been testified, is without question a station of the 3-A class of radio stations. Such a

station is one which operates with power or not less than one kilowatt nor more than five kilowatts and the service area of which is subject to interference in accordance with the engineering standards of allocation. And then, Section 3.30 of the Communications Act provides that such station, "Each standard broadcasting station will be licensed to serve primarily a particular city, town, or other political subdivision, which will be specified in the station's license, and the station will be considered as located in that place." And subsection (c) of that, "The transmitter of each standard broadcast station shall be so located that the primary service is delivered to the borough or city in which the main studio is located, in accordance with the standards of good engineering practice."

There must be in ordinary broadcasting three service areas. They have been defined by the Federal Communications Commission as follows: "The term 'primary service area of a broadcasting station' means the area in which the ground wave is not subject to objectionable interference or objectionable fading." Under that particular classification it has been testified in this case that during the daytime hours KPOA does its broadcasting by the means of the ground wave and that this ground wave reaches the entire group of the Hawaiian Islands, with two exceptions. However, we may say two major exceptions. One is an area on the northern part of Kauai, just back of the mountains that we know as Kokee, or the Canyon; the other is that area south of the high mountains on the Island of Hawaii and includes the city of Hilo. And it might be well to note at this particular place that this station, as well as

another broadcasting station located here in Honolulu, each has a subsidiary or connected station located in the city of Hilo. The secondary area of a broadcasting station means the area served by the sky wave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity.

It has been testified in this case that at night the signals by the radio broadcasting are sent out to a great extent through a sky wave or sky waves and at night these sky waves, as the Court understands them, goes up a ways and hits something, bounces back and hits the earth or water and then back again, and these going back and forth reach out and under certain phenomena can be heard in almost any place on earth.

But the question for this Court to decide in that particular category is, what is the area in which the sky waves are of such intensity and are capable of being, we may say, pleasurably heard by a listening audience —we may put it this way—to be of commercial value to a radio station that is in business with the exception of 30% of its time which may be allotted to programs from which he can, if he can find sponsors, get remuneration for the operation of that station.

There is a third area of service and it is defined as the area, the intermittent service area of a broadcasting station, means the area serviced from the ground wave but beyond the primary service area, subject to some interference or fading.

There have been a lot of technical terms used here. I hope I don't make a mistake in the use of them, but this Court, hearing this case, of course this Court has

the first chance of making the mistake, if I do make the mistake. I don't feel that I am too much to be blamed because this is something I never heard of before in my life. It seems to me, as I understand the ground wave, that there is .5, approximately .5 of a microvolt per meter is the area, or something of that kind, wherein there is supposed to be proper listening, and you go on from there out until you get less and less. I think I had that ' wn here some place, but the attorneys know what I mean anyway; they understand what I am talking about.

In this case there have been letters, what they call D-X letters that have been received. These letters fall in the category, as I understand it, of people that have a hobby to a great extent of listening to stations and picking up signals, and a lot of them have a regular form letter that they send in, and one of the things they seem to be interested in is to get an acknowledgment to put in their albums or collection, or whatever it is. So that these D-Xer letters have come from a great many places. I believe, if my memory serves me correctly, there was one received from some place in Massachusetts, there was one received from some place in Australia, a number from New Zealand, Samoa, and various places in the Pacific, and of course a number of other places on the mainland. It is my recollection also that this reception or hearing of this station were all received via the route of the sky wave as contradistinguished from the ground wave. There is an exception of one instance, in which there was some testimony that on the battleship Iowa, I think it was, that somebody heard a ground wave on one of the radio re-

ceiving stations on board that vessel, some 1,500 miles out to sea. One of the engineers, the engineer for the Territory, said it was possible but it was an exception, that generally speaking the volume of the ground wave at that distance in the daytime was, as I understood what they were endeavoring to state, that when the ground wave gets down so it is weak enough, then it is drowned out and it doesn't become listenable because of ground noises.

So that this Court, after listening to this evidence, and in its ordinary, simple terms, I am not endeavoring to get into the field or to use the language of the gentlemen who have been on the stand because I would just get myself tied up in knots, I believe that the evidence here shows that the ground waves certainly, or the daytime broadcast is incapable, so far as any commercial value for constant listening, is confined to the Hawaiian Islands; that the sky wave at night for commercial purposes, I believe, is also limited to the Hawaiian Islands. That is, for dependability.

Now, it seems that in radio that the hours of the day, the seasons of the year, vary, the ability to receive these broadcast signals so that at certain seasons of the year signals can be very plainly heard in Alaska, certain seasons of the year they can be heard south, and if the channel through which they travel is in darkness, then that aids in its reception.

There has been introduced into evidence a great many articles from magazines, advertising radio coverage, also brochures, so-called, that this station and other stations here in the Territory have put out, I under-

stand for the purpose of advising their prospective sponsors or persons buying radio time, that the map or chart, to a great extent, exhibited or attached to such an article, is the coverage or the area that the radio selling the time is covered. In each of those instances here in Hawaii, they have not gone beyond the Territorial limits of the Territory of Hawaii, that is, for local broadcasting. I am talking about the ordinary broadcaster's band and not the short-wave band.

There has been testimony that in one instance a gentleman from Samoa, who I understand is now in Durance Vile, purchased some time to broadcast a program to Samoa, and it was broadcast, as I recall the testimony, at an hour in the wintertime, in December, as I recall, when the sky wave would be used at night to deliver the program to Samoa.

There is evidence in this case that a request has been made of these complainants to produce any sponsor who has purchased commercial time on their broadcasts with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii; that there has been no showing of any such thing, with the exception of this one Samoan program, if you can call that one.

Now, we come down to reality—what does this broadcast company make its money out of? With the exception of short-wave relays such as baseball games, fights, football games, various programs such as Hawaii Calls, and that sort of thing, which is either sent or received by short-wave to or from the mainland, as the case may be, their broadcasting, in the Court's mind, is confined to the Territory of Hawaii and they make their money

with Hawaiian audiences in view and not the audience outside the Territory.

Let's go into these various cases, or let's say these various lines of cases that have been ably argued before the Court. We take first the stevedoring cases. There have been attempts in various courts of the United States to tax stevedoring companies on the receipts that they have made from loading and unloading steamships. It has been apparently uniformly held that that is an interference with interstate commerce, the reasoning being that when you put cargo on a vessel it is going either to a foreign port or to another state, and they have held that the interstate transportation of that cargo starts when the sling or when you put the cargo in the sling to put it on the ship and it is not completed until it is taken off the sling and put on the dock at its destination.

Now, another line of cases is the railroad cases. We have a great many trans-continental railroads and many of them that involve a number of states. It seems to be the universal holding that a railroad system is so intricate in its nature that you cannot tax it because you cannot segregate the services, so that it is more or less custom, and of course, we have our steamship fares, our airplane fares, and things of that kind, which are within interstate commerce.

There has also been brought to the attention of this Court a number of cases, what they commonly call trucking cases, and where it has been shown that the trucking was solely of an interstate nature, then the states have been prohibited from interfering with that

or with taxing its proceeds. However, it has been held in one case of a belt-line railroad, where it picks up freight cars from freight yards of various railroads and takes them to the docks in a city, that is where it is wholly within the city area, and that is the only business of the belt railroad, that that is intra-state commerce and subject to taxation.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court would without hesitation find that this was an interstate enterprise.

There have been a number of cases which Mr. Davis, able counsel for the stations, has brought to the Court's attention, particularly in the State of Washington, the leading case being what has been referred to here as the *Fisher's Blend* case. That case went to the Supreme Court of the United states and Mr. Justice Stone, I believe, made a finding that the radio field was interstate in its nature. But in that particular case the facts which were furnished the court, there was a stipulated set of facts that went to the Supreme Court, upon which we must consider is the basis of their decision, and it was that this station was engaged in broadcasting on a clear channel, not only interstate but international, and that it received money for that sort of broadcasting. So that, under the stipulated facts the Court could make no other finding. Then there are other Washington cases of a similar nature that have found to the same effect.

There is a case that has been referred to as the *Albu-*

querque case, where the station was located in Albuquerque and a tax of this kind was sustained down there on the basis that that station only served a particular area and that particular area was within the state, and they excepted, if my memory serves me right, any programs over that station that were broadcast through a media coming from outside the state, or in that particular case, where they have a chain of broadcasting stations, the station was sending a program from that station to other stations.

Now, here, I believe that our situation is different than it is upon the mainland. It is 2,500 land miles approximately from here to the Pacific Coast. I do not believe, with a station of this kind, that it could or has engaged, with reference to its ordinary broadcasting band, and I am not talking about short-wave relay, in interstate commerce in that regard.

The complainants have not shown to this Court that this gross income tax of 2%, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station that would interfere with its operation. It does not lie in the same category as the Colorado Railroad case, wherein the short-line railroad or the railroad made a contract with the state to operate a short line within the state, and the Federal people said that that contract was no good because it would be a drain and a hindrance to the operation of the main railroad in interstate commerce.

Now, gentlemen, in general that is what the Court has found. Of course, there are these foreign programs, these foreign language programs, operating and they sold time on those.

The Court has gone over the proposed findings of fact that have been submitted here by Miss Lewis. I think I have covered them considerably, but in order that there can be no mistake, I think that those proposed findings of fact meet with the Court's approval, and if the Court has overlooked any of them in its oral decision they may be incorporated in the final decision as part of the Court's findings.

And the Court finds, in essence then, in favor of the Territory and against the complainants for the reasons here stated.

The prevailing party will submit a form of decision in conformity with the findings of the Court herein announced and may incorporate the oral decision of the Court by reference as it is reflected in the reporter's notes taken at this time.

The Court at this time wishes to thank both sides in this case for an able presentation of the case. I do not purport to be omnipotent. All I can say is, that another gentleman has said, a gentleman from the State of Washington, the Honorable Jeremiah Neterer, that I happen to be the judge to have the first opportunity to make a mistake.

All right, gentlemen. You may have your exception.

MR. INGMAN: We except to your Honor's ruling on the ground it is contrary to the law and the evidence and give notice of a motion for new trial and notice of an appeal.

And there is one exhibit here, your Honor, that we now have and we would like to substitute.

DECISION OF THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

As written by Rhoda V. Lewis, Esq., Deputy Attorney General, Territory of Hawaii

[Underscored portion is that which was added, or modifying Court's Opinion, by appellee's counsel]

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII
AT TERM IN LAW

J. ELROY MCCAW and JOHN D. KEATING,
Complainants,
v.
THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY,
Defendant.
No. 21340

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST
Filed in open court at 2:15 o'clock p.m., Jan. 28, 1952
R. A. Lynn, Clerk.

RHODA V. LEWIS, ESQ.
Deputy Attorney General
Territory of Hawaii
Attorney for the Tax Commissioner

DECISION [*Written by Appellee*]

This is an action by the complainants, J. Elroy McCaw and John D. Keating, to recover gross income taxes paid under protest, together with some interest and penalties. The tax law involved is chapter 101 of the Revised Laws of Hawaii 1945, as amended.

Complainants are a co-partnership, registered as such under the laws of the Territory of Hawaii, and they hold under said chapter 101 a license to engage in

business; this license has been renewed annually to and including the year 1951. (Pursuant to section 5451.01, as amended, renewal for 1952 may be on or before January 31, 1952).

The tax assessments concerned in this case involve the period to and including July 31, 1950. Complainants paid under protest part of the taxes demanded by the Tax Commissioner for this period. The Tax Commissioner, defendant herein, in addition to denying the allegations of the complaint, cross-complained for the balance of the taxes assessed by him for this period, together with penalties and interest. An oral motion to dismiss this counterclaim was made on January 14, 1952, and was denied on the ground that section 10476 of the Revised Laws of Hawaii 1945 is applicable.

The taxes involved in this case were levied against broadcast receipts of the aforesaid period. During this period complainants operated, and now operate, a radio broadcast station on a frequency of 630 kilocycles with 5000 watts of power. This station operates under the call letters KPOA, and commonly is so known. Complainants also operate, in connection with KPOA, a station in Hilo, but the Hilo station commenced operations subsequent to the period involved in the aforesaid assessments.

The business in which complainants are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission under the Communications Act of 1934, Title 47, chapter 5, United States Code. It is the contention of the complainants that this field of endeavor has been preempted by the federal government to the exclusion of

any state or territorial tax. It further is contended by the complainants that this radio station is engaged in interstate commerce, and that the territorial tax is a burden upon interstate commerce and an undue interference therewith, and therefore void.

The Tax Commissioner, on behalf of the Territory, asserts that the federal statute and regulations embrace more than interstate communication (and from sections 3(e) and 301 of the Communications Act of 1934, 47 U.S.C. 153(e) and 301, this appears to be so); that the breadth of the field of regulation under the Communications Act of 1934 does not indicate that the states and the territories are excluded from all taxes in this wide field; that the pertinent question here is the extent to which KPOA is engaged in interstate communication and whether the taxed receipts are derived from interstate communication; that the facts show that the sole source of the taxed receipts is the transmission of KPOA broadcasts to the radio audience in the Territory, hence those receipts are from solely intrastate communication and may be taxed, and that no illegal burden on interstate commerce results from such a tax. The Tax Commissioner asserts the fact to be that KPOA's standard band broadcasts do not reach any radio audience outside the Territory with effective or satisfactory service that is of commercial significance, that only the receipts from short-wave relays are from interstate communication and those have not been taxed.

After trial of the case commencing January 3 to and including January 11, 1952, study of the memoranda which the parties submitted at the inception of the

trial and authorities cited, and oral argument on January 14, 1952, the Court on January 15, 1952, rendered its oral decision upholding the contentions of the Tax Commissioner; said oral decision, as reflected in the official reporter's notes, is incorporated herein by reference.

It has been held in a number of cases, upon which the complainants rely, that radio broadcasting, by its very nature, is interstate commerce for the reason that once the radio impulses or waves are put in motion there is no control over the extent of their transmission. But the pertinent question is: What is the area in which the KPOA broadcasts have commercial value? Save for 30% of its time which, under F.C.C. requirements, must be used for sustaining programs, the station may and does seek remuneration from sponsors of commercial programs and the like. So what we come down to is: What does this broadcast company make its money out of? The Court has concluded that, with the exception of the short-wave relays, KPOA makes its money with the Hawaiian audience in view and not the audience outside the Territory. As a result the receipts from these broadcasts may be taxed.

The receipts from railroads have been held taxable where obtained from the transportation of freight picked up at a point within the state and delivered to another point in the same state. In the case of a transcontinental railroad system the transcontinental hauls are tax exempt, but not the local business, although a railroad system is intricate in its nature. (See *Pacific Telephone and Telegraph Co. v. Tax Commissioner*, 297 U.S. 403). So with the trucking business, it is where

the trucking is solely of an interstate nature that the states have been prohibited from taxing the proceeds. As to stevedoring, it has been held that when the cargo is put in the sling to put it on the ship that is the start of the interstate transportation and for that reason to tax the stevedoring receipts is an interference with interstate commerce.

Here as already stated the tax is on intrastate communication, and the complainants have not shown to this Court that this 2½% gross income tax, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station as to interfere with its operation. What complainants would have had to show can be ascertained by considering the Colorado Railroad case (271 U.S. 153), which was explained and held inapplicable in certain tax cases that were decided in *Pacific Telephone and Telegraph Co. v. Tax Commissioner, supra*, 297 U.S. 403.

The leading case as to radio broadcasting is the *Fisher's Blend* case (297 U.S. 650). In that particular case there was a stipulated set of facts that went to the Supreme Court, and which we must consider to be the basis of the decision. Under those facts the broadcasting there was not only interstate but international and the station received money for that sort of broadcasting. A radio station in Spokane, Washington, or Coeur d'Alene, Idaho, or El Paso, near the Mexican border, or Yuma, Arizona, near the California border, might be interstate. However, a station in Albuquerque, New Mexico, was held (51 N.M. 332 and 54 N.M. 133, 184 P. (2d) 416 and 215 P.(2d) 819) to have some broadcasts

that were directed only to a particular area within the state, though certain chain broadcasts and certain broadcasts of out-of-state media were held non-taxable.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court without hesitation would find that this was an interstate enterprise. But it is situated in Honolulu, 2,500 land miles from the pacific coast. It is, under the regulations of the Federal Communications Commission (47 C.F.R. Chapter 1, Part 3) a Class III-A station, as set forth in Sec. 3.22 of the cited regulations (Exhibit 1). Attention also is called to section 3.30, paragraph (a), as to the place which a standard broadcast station is licensed to serve primarily, and paragraph (c) of the same section as to the location of the transmitter for the delivery of primary service to the place where the main studio is located. By the above cited regulations and the "Standards of Good Engineering Practice Concerning Standard Broadcast Stations" (Exhibits 1 and 2) the Federal Communications Commission has defined three service areas and has set standards for the determination of these service areas.

During the daytime hours KPOA does its broadcasting by means of the groundwave. The area in which the groundwave is not subject to objectionable interference or objectionable fading is, under the F.C.C. regulations and standards, above cited, the primary service area. A groundwave signal of half a millivolt per meter (.5 mv/m) generally will afford proper listening. KPOA has a groundwave signal of .5 mv/m or better throughout the Hawaiian Islands, as shown on Exhibits 5a and

37, but with two major exceptions there shown. These exceptions are the northern part of Kauai, just back of the mountains that we know as Kokee, and the area (including the city of Hilo) south of the high mountains on the island of Hawaii. It is noteworthy that the evidence shows that KPOA has a connected station located in Hilo, and also shows another such instance in connection with another Hawaiian station.

Beyond the half-millivolt groundwave contour the possibilities of service by the groundwave depend on certain factors set forth in the F.C.C. standards, and as the signal grows less and less the question is whether the groundwave is rendering "intermittent service," the "intermittent service area" being defined by the F.C.C. as "the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading." Intermittent service depends upon a number of factors, but it is clear that when the groundwave signal is so weak it is drowned out by the noise level, that cannot be listenable. Upon all of the evidence (including the evidence as to reception on the battleship Iowa under the particular circumstances explained by the engineer called by the Territory) the Court has concluded that finding number 5, below set forth, is correct.

During hours of darkness a radio station can broadcast by the skywave. Under certain phenomena the skywave signal can be heard almost any place on earth. The area served by the skywave and not subject to objectionable interference is, by the F.C.C., called the "secondary service area." Standards for "secondary service" are set forth by the F.C.C. in the "Standards

of Good Engineering Practice" (Exhibit 2). It is not suggested that reception outside the Territory of the skywave signal of this Class III-A station meets those standards.

The evidence shows that reception of the skywave is not dependable, due to a number of factors. Letters received in evidence from persons reporting listening in distant places (commonly called "D-X" letters) have been considered. These were instances of reception outside the Territory by the skywave, but such reception outside the Territory is not sufficiently dependable for commercial purposes.

There have been introduced in evidence and the Court has considered advertisements of radio station coverage of stations in the continental United States and the Territory, including a brochure put out by this station. In no instance in the Territory has the advertised coverage gone beyond the territorial limits of the Territory of Hawaii.

There is evidence of a request made by the Tax Commissioner of the complainants to produce any sponsor who has purchased commercial time on KPOA with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii. There has been no showing of any such purchase. A possible exception is the sale of radio time to Willie Saaga for a Samoan program (Exhibit L). The circumstances of this sale appear from the evidence. When the Tax Commissioner was preparing the assessments no showing of this sale was made to him although KPOA was given an opportunity to make such showing;

finding and conclusion number 10, below set forth, dispose of this matter.

There have been submitted by the Tax Commissioner proposed findings and conclusions, which include some of the matters above set forth and some additional matters. The Court finds and holds these to be in accordance with the law and the evidence; they are as follows:

1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage.

2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience.

3. Where a KPOA broadcast is directed to an out-of-the-territory audience a shortwave relay is used, as in the case of the program "Hawaii Calls."

4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by shortwave relay or brought into the Territory by shortwave relay.

5. During daylight hours enjoyable listening to the KPOA standard band broadcasts is impossible at places outside the Territory, and is limited to ships or planes that happen to be within range.

6. During hours of darkness reception of KPOA's standard band broadcasts outside the Territory is too unreliable and irregular for such reception to have commercial value.

7. KPOA has a "foreign language department"

which is offered by it as a service to advertisers. This department conducts, each broadcast day, a substantial number of hours of broadcasts in Japanese and in a Filipino dialect. These broadcasts are scheduled by the station each day on a participating basis, that is, the station puts on the foreign language programs and sponsors buy spot announcements on the programs.

8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

9. The radio audience outside the Territory of Hawaii is not a factory in the selling or buying of radio time on station KPOA, where no shortwave relay is employed.

10. The sale of radio time to Willie Saaga, shown by plaintiffs' Exhibit L, is an exceptional instance, and the Tax Commissioner was not obliged to take notice of this exceptional instance unless it was called to his attention. Before the tax assessments were made KPOA was given an opportunity to make such showing but did not do so and is not now entitled to a deduction for this sale.

11. The Territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the tax law and assessments made thereunder are valid.

12. The plaintiffs are not entitled to recover the taxes paid under protest and the Tax Commissioner is entitled to judgment on his counterclaim.

In accordance with the foregoing the Court finds that the sum of $7,637.33 paid under protest by the com-

plainants to the Tax Commissioner is a lawful government realization and that the complainants are not entitled to recover the same, and in addition thereto the Tax Commissioner, on behalf of the Territory, is entitled to recover of the complainants the further sum of $14,595.98 together with additional interest accrued from the first day of April, 1951, to and including the 31st day of January, 1952, in the amount of $96.98 for each month, or fraction thereof, and the costs herein incurred. A judgment in accordance herewith will be signed on presentation.

DATED at Honolulu, T. H., this 28th day of January, 1952.

WILLSON C. MOORE
Judge of the Above Entitled Court.

J. ELROY MCCAW and JOHN D. KEATING, Complainants herein, do hereby except to the foregoing Decision.

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*
By DAVID N. INGMAN, KENNETH DAVIS, JUSTIN MILLER and VINCENT T. WASILEWSKI, *Their Attorneys,*
By DAVID N. INGMAN

EXCEPTION ALLOWED this 28th day of January, 1952.

*S/*WILLSON C. MOORE (Seal)
Judge of the Above Entitled Court.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office, in full force and effect this 17th day of April, 1952. AMY E. NUTTALL, *Clerk, Circuit Court, First Circuit, Territory of Hawaii.*

FILED
JAN 10 1955
HAROLD B. WILLEY, C

No. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

J. ELROY McCAW AND JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, Tax Commissioner of the Territory of Hawaii,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

EDWARD N. SYLVA
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RHODA V. LEWIS
Deputy Attorney General of Hawaii
Counsel for Respondent

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No. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

J. ELROY MCCAW AND JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, Tax Commissioner of the Territory of Hawaii,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

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The opinion of the Supreme Court of Hawaii (R. 51-121) is reported in 40 Haw. 121.

JURISDICTION

The petition for certiorari seeks review, under section 1254 (1) of the Judicial Code (28 U.S.C. 1254 (1)), of a case which reached the Court of Appeals upon appeal from

the Supreme Court of Hawaii under section 1293 of the Judicial Code (28 U.S.C. 1293).[1]

On October 30, 1954 (R. 148) judgment of the Court of Appeals was entered affirming the judgment which the Supreme Court of Hawaii had entered June 8, 1953 (R. 123-124).

STATUTES AND RULES INVOLVED

There are set forth in the appendix the following statutes[2] and rules:

47 U.S.C. 153, subsections (a)-(g), (k) and (v), being a portion of section 3 of the Communications Act of 1934, 48 Stat. 1065, as amended 50 Stat. 189, 60 Stat. 1352. (The petition sets out only subsections (a), (b), (d) and (k), omitting the definitions of "Interstate communication" and "State.")

47 U.S.C. 606, subsections (c), (d) and (f), being a portion of section 606 of the Communications Act of 1934, 48 Stat. 1104, as amended 56 Stat. 18, 56 Stat. 1096, 61 Stat. 449. (This section of the Communications Act of 1934 is not set out in the petition. It is the one section that mentions state taxation.)

Section 5455 of Chapter 101, Revised Laws of Hawaii 1945, as amended by Acts 100 and 253, Session Laws of Hawaii 1945, and Acts 111 and 113 of the Session Laws of Hawaii 1947. (This is the section of the territorial tax law imposing the tax. There has been set forth in the petition the portion (subsection D) relating to radio broadcasting stations.)

---

[1] The suggestion of the petitioners that an appeal be allowed under 28 U.S.C. 1257 (2) is regarded by the respondent as frivolous, inasmuch as petitioners appealed from the Supreme Court of Hawaii to the Court of Appeals for the Ninth Circuit and could not now, irrespective of the status of the Hawaiian court, take a direct appeal from the Supreme Court of Hawaii to this Court.

[2] Statutes are set out in the appendix as they read during the taxation periods involved and at the time this action was instituted.

Rule 10, Court of Appeals for the Ninth Circuit, being the same as the former Rule 11. (The petition sets out only paragraph 1 of this rule, but not paragraph 2.)

Rule 17, Court of Appeals for the Ninth Circuit, being the same as the former Rule 19. (This is the rule relating to printing of records. It is not set out in the petition.)

QUESTION PRESENTED

The question presented is:

Is the Territory of Hawaii without power to tax the business of radio broadcasting, when the tax is imposed upon the broadcasts transmitted by the Hawaiian station to the Hawaiian audience and measured by gross income derived solely from such broadcasting?

STATEMENT OF THE CASE[3]

On May 3, 1951 the petitioners filed in Law No. 21340 in the Circuit Court, First Judicial Circuit, their amended complaint (R. 3-27) in a suit brought pursuant to section 1575 of the Revised Laws of Hawaii 1945 (R. 22) to recover the sum of $7,637.33 paid under protest on March 21, 1951. The respondent has conceded that the suit was commenced within the period of thirty days after the protested payment, as provided by said section 1575 (R. 55).

The amended complaint alleged that the taxes so paid under protest were assessed upon the gross receipts from radio broadcasting by station KPOA, Honolulu, owned and operated by the petitioners (R. 5, 24). It attacked as illegal section 5455D of Chapter 101 of the Revised Laws of Hawaii 1945, under which the taxes were assessed, asserting that all radio broadcasting is interstate commerce and that Congress has pre-empted the subject matter of radio broadcasting to the exclusion of state and territorial taxation (R. 3-23).

[3] Petitioners' "Statement of the Case" is replete with argument, and in many respects is not in conformity to the record. Respondent here submits a complete restatement of the case.

Chapter 101 of the Revised Laws of Hawaii 1945, known as the "general excise tax" or "gross income tax" law, is a statute imposing a tax upon business in the Territory measured by the gross receipts thereof. It applies to sales, services, and in general all types of business as shown by section 5455 thereof (App. 4-6). Subsection D of section 5455 relates to radio broadcasting stations (App. 5).

Petitioners are a co-partnership registered as such under the laws of the Territory of Hawaii and doing business under the name of Island Broadcasting Company (R. 55). The partnership, during the period involved, owned and operated radio station KPOA, located in Honolulu, Territory of Hawaii, for which it held a license from the Federal Communications Commission. KPOA commenced broadcasting on October 15, 1946 (R. 65). It is a 5000 watt Class III station (R. 67-68).

For the period October, 1946 to and including November, 1947 the partnership returned for taxation under Chapter 101 its broadcasting income, and paid the tax thereon, without claiming any exemption or deduction for interstate commerce (R. 65). For December, 1947 and thereafter, while continuing to report income from broadcasting, the partnership claimed exemption of all such income on the ground of it being from "interstate commerce" (R. 65-66). The contested assessments thereafter were made by the Tax Commissioner.

The Tax Commissioner in his answer and counterclaim (R. 27-35) asserted that the gross receipts assessed for taxation were derived from the transmission of KPOA broadcasts to the radio audience in the Territory of Hawaii, that KPOA does not reach an audience outside the Territory of Hawaii with effective and satisfactory service that is of commercial significance in the sale of radio time, that sponsors purchasing radio time on KPOA do not do so with a view to reaching an audience outside the Territory of Hawaii, that where sponsors have occasion to reach an audience outside

the Territory a short-wave relay is employed, and that the Tax Commissioner excluded from the tax assessments the receipts from the programs transmitted by short-wave relay. The Tax Commissioner asserted that the tax was a lawful government realization (R. 27-33).

The case came on for trial without a jury, and evidence was received January 3, 1952 to January 11, 1952 (R. 56). On January 15, 1952 the Court announced from the bench its findings of fact and conclusions, which were incorporated in the written decision entered January 28, 1952 (R. 36-47).

The trial court found that reception outside the Territory was not sufficiently dependable and effective to be of value for commercial purposes, and concluded that, except for the short-wave relays, appellants made their money from their broadcasting to the Hawaiian audience, and that the radio audience outside the Territory is not a factor in the selling or buying of radio time on station KPOA where no short-wave relay is employed (R. 39, 44-46). The trial court noted that the two and one-half per cent tax was of general application in the Territory, and held that the petitioners had not shown the court that the tax was such a burden upon the station as to interfere with its operation (R. 40). The court concluded that the tax had been properly interpreted and applied by the Tax Commissioner and that the tax law and assessments made thereunder were valid (R. 46).

The case was taken to the Supreme Court of Hawaii by writ of error (R. 48). That Court held that the trial court's findings were supported by the evidence, which it reviewed (R. 58-60, 65-89, 100, 113), that the tax assessed was neither upon proceeds from interstate commerce, nor a burden upon interstate commerce (R. 100, 113-114), that the tax was upon the business of radio broadcasting "Within this Territory," measured by the gross income of such business and excluding broadcasts between points in the Territory and points outside the Territory (R. 116-117), and that the

Tax Commissioner had assessed the tax accordingly by excluding receipts of KPOA from short-wave relays, being broadcasts between points in the Territory and points outside the Territory, and by including and thus subjecting to the tax only receipts of the station from its "standard wave" broadcasts which latter are of commercial value only within and not outside the Territory (R. 117, also R. 58-60, 100-101, 11[illegible]). The decision and judgment of the trial court were affirmed (R. 120-121).

Torkel Westly, who was Tax Commissioner when the case arose, having resigned from said office, Earl W. Fase, the incumbent Tax Commissioner, was substituted (R. 121-122), and judgment of the Supreme Court was entered accordingly (R. 123). Said Earl W. Fase, the present Tax Commissioner, is the respondent here.

Petitioners appealed to the Court of Appeals for the Ninth Circuit under 28 U.S.C. 1293. In that Court petitioners applied for an order dispensing with the printing of the record (App. 12), but this was denied (App. 16). Petitioners did not designate any of the evidence for inclusion in the printed record (App. 17).

The Court of Appeals, after noting that the evidence was not before it and that in reality the petitioners were contending that it appears from the pleadings themselves that the tax is invalid (R. 138, Pet. App 12A-13A), stated that: "The question to determine is whether the tax burdens interstate commerce." (R. 139; Pet. App. 13A). Citing *Pacific Telephone and Telegraph Co. v. Tax Commission*, 297 U.S. 403, the Court noted that "even where the same instrumentalities are used in inter and intrastate commerce, a tax on the local business based upon the gross income has been sustained." (R. 141; Pet. App. 16A). Comparing that case with the present case, the Court said: "There, as here, there was no proof offered that the tax did, in fact, burden interstate commerce." (R. 141; Pet. App. 16A). The Court quoted the holding in *Pacific Telephone and Telegraph Co.*

that: "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable." (R. 141-142; Pet. App. 17A), and noted that this case was interpreted in *City of Chicago v. Willett Co.*, 344 U.S. 574, 578, as requiring an affirmative showing by the taxpayer that the tax in fact burdens interstate commerce in a case in which, although the taxpayer's intrastate and interstate activities are inseparable, the tax is not laid inseparably on both (R. 145; Pet. App. 21A).

Pacific Telephone and Telegraph Co. was deemed by the Court below to have decisive significance because it was decided at the same term as *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650, a case involving a gross receipts tax upon radio broadcasting. In *Fisher's Blend*, said the Court below, "the parties stipulated that the case might be submitted upon the facts recited in the complaint," and "there was nothing in the complaint to show that an attempt was made to segregate the receipts derived from local broadcasts." This was "the gist of the opinion," the Court below held, citing pages 655-656 of the opinion in 297 U.S. (R. 142-143; Pet. App. 18A).

Contrasting the stipulated facts in *Fisher's Blend Station* with the facts before it, the Court below held that the principle of *Pacific Telephone and Telegraph Co.* required affirmance of the Supreme Court of Hawaii, on the ground that:

> "The trial court found that the station operates within the Territory and the Supreme Court of Hawaii, in sustaining the judgment of the trial court, made special reference to the findings and found that any income from short-wave relays was specifically excluded, saying:
>
> "The tax is upon the business of radio broadcasting "within this Territory," measured by the gross income of such business. This excludes broadcasts be-

> tween points in the Territory and points outside the Territory. * * * The tax commissioner has assessed the tax accordingly by excluding therefrom receipts of KPOA from short-wave relays being broadcast between points in the Territory and points outside the Territory and by including and thus subjecting to the tax only receipts of the station from its "standard wave" broadcasts, which latter are of commercial value only within and not outside the Territory.' *McCaw v. Fase*, supra, at p. 715 [sic, correctly 175].
>
> "We, therefore, have an authoritative finding by a territorial court approved by the highest court of the Territory which distinctly says that not only the statute itself, but also the practices under it, limit the tax to income from local activities only." (R. 143; Pet. App. 19A.)

Dismissal for want of a substantial federal question of the appeal taken in *Vinsonhaler v. Beard*, 338 U.S. 863, 896, from the decision of the Supreme Court of Arkansas in *Beard v. Vinsonhaler*, 215 Ark. 389, 221 S.W. 2d 3, was deemed significant by the Court below, inasmuch as the statute sustained by the Arkansas Supreme Court imposed a license tax upon the business of intrastate radio broadcasting. Since that appeal was taken under 28 U.S.C. 1257 (2), this Court was bound to entertain the appeal if such a tax violated any constitutional provision, the Court below noted (R. 146-147, Pet. App. 22A-23A).

As to federal licensing and regulation of radio stations, the Court below held that the stations did not thereby become agencies of the Government immune from state taxation, and that regulatory measures are in a different category from purely taxing measures (R. 143-144; Pet. App. 9A-20A). Said the Court below: "the character of radio communication does not prohibit a tax upon the state business any more than the interstate character of railroads, power companies, telephone, telegraph and express compa-

nies stands in the way of valid tax statutes of the type under discussion." (R. 144; Pet. App. 20A).

In the Supreme Court of Hawaii the petitioners had waived certain assigned errors, as that Court held (R. 60-61). These were not included in the Statement of Points on Appeal filed in the Court of Appeals (R. 132, incorporating R. 125-129). Nevertheless petitioners now include them in their petition (Pet. 5, 8, 28, 34-37). This will be brought out in the argument below.

SUMMARY OF ARGUMENT

Radio Station KPOA does not have interstate coverage that is of value in the sale of radio time. Its receipts are derived from the transmission of broadcasts to the Hawaiian audience. This transmission to the audience in the Territory may be taxed, measured by the receipts therefrom. Only such receipts have been taxed.

When a short-wave relay is employed the Hawaiian broadcasts are carried to an out-of-the-Territory audience, but the receipts from such short-wave relays have not been taxed, nor has the tax been imposed upon mainland broadcasts simultaneously received by the Hawaiian audience through the use of a short-wave relay. Hence all of the taxed receipts are from broadcasts of the Hawaiian station to the Hawaiian audience.

The local business is taxed along with other local business, and the tax does not discriminate against interstate commerce. Because the tax is not upon interstate communication the possibility of a tax being imposed at an out-of-state point of reception does not enter into the case, and the multiple burden test has no significance here.

The station's intrastate business from which it derives the taxed receipts need not be separable from the untaxed interstate commerce; since the tax is solely on the intrastate business and confined thereto by being measured by the receipts therefrom it would have to be affirmatively shown

that the tax is so burdensome as to actually interfere with interstate commerce, but this has not been shown. Also applicable here is the rule that interstate aspects of a business that are merely incidental may be disregarded.

The scope of federal regulation is not the yardstick for this case. That Congress has not pre-empted the field of radio broadcasting to the exclusion of state taxing powers, any more than the fields of telegraph and telephone communication, has been recognized in section 606 of the Communications Act of 1934. The doctrine of implied tax immunity is of very narrow application.

The decision below follows well established principles, laid down by this Court in a series of decisions of which the following are the most important:

Pacific Telephone and Telegraph Co. v. Tax Commission, 297 U.S. 403, holding that in the case of a telephone or railway company having inseparable intrastate and interstate activities, a tax measured by a percentage of the gross income drawn solely from intrastate business is not laid inseparably upon both, and it is for the taxpayer to show affirmatively that the tax, though directed at intrastate business only, in fact burdens interstate commerce.

Fisher's Blend Station v. Tax Commission, 297 U.S. 650, establishing the principle that radio transmission in all essentials is like transmission by telephone or telegraph, and holding in a case coming up on stipulated facts that as it did not appear that any of the taxed income was allocable to intrastate commerce the tax as a whole must fail.

Vinsonhaler v. Beard, 338 U.S. 863, rehearing denied 338 U.S. 896, dismissing for want of a substantial federal question the appeal from *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3, and thereby upholding a tax upon the business of intrastate radio broadcasting.

The petition presents no grounds for certiorari. That it disregards the applicable rules of appellate procedure also is a matter covered by the argument.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN ACCEPTING THE FINDINGS OF THE TRIAL COURT AFFIRMED BY THE SUPREME COURT OF HAWAII.

The trial court (the Circuit Court of the Territory of Hawaii, First Circuit) made findings and conclusions, as follows:

> "* * * with the exception of short-wave relays, KPOA makes its money with the Hawaiian audience in view and not the audience outside the Territory." (R. 39, 58.)
>
> "* * * the complainants have not shown to this Court that this 2½% gross income tax, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station as to interfere with its operation." (R. 40, 58-59.)

Also numbered findings and conclusions, of which the following are the most important:

> "1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage." (R. 44, 59.)
>
> "2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience." (R. 45, 59.)
>
> "3. Where a KPOA broadcast is directed to an out-of-the-Territory audience a short-wave relay is used, as in the case of the program 'Hawaii Calls.'" (R. 45, 59.)
>
> "4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by short-wave relay or brought into the Territory by short-wave relay." (R. 45, 59.)
>
> "8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered." (R. 45-46, 60.)
>
> "9. The radio audience outside the Territory of Ha-

waii is not a factor in the selling or buying of radio time on Station KPOA, where no short-wave relay is employed." (R. 46, 60.)

"11. The territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the tax law and assessments made thereunder are valid." (R. 46, 117.)

By addenda to the petition's appendix, with interpolated remarks and underscoring, petitioners' counsel has endeavored to make it appear that the numbered findings and conclusions were not the trial court's (Pet. App. 49A-50A). The fact is that these numbered findings and conclusions had been proposed by the Tax Commissioner (respondent here), and had been served and filed on January 11, 1952 (Record of Supreme Court of Hawaii, pp. 127-130, App. 18-21). On January 15, 1952 at the conclusion of the trial and after hearing argument, the Court approved them and announced from the bench that "they may be incorporated in the final decision as part of the Court's findings." (Pet. App. 40A, lines 1-8, Transcript of trial court proceedings p. 754, Record of Supreme Court of Hawaii, p. 143). Accordingly this was done, and the numbered findings and conclusions are a part of the Court's decision entered January 28, 1952 (R. 44-46; Pet. App. 49A-50A). The matter is considered in more detail in a footnote.[4]

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[4] On January 15, 1952, at the conclusion of the trial and after hearing argument, the trial court announced its decision from the bench. This is hereinafter referred to as the "oral decision."

The findings of the Court announced in the oral decision included the unnumbered findings and conclusions above set forth (Pet. App. 36A, line 25, to 37A, line 2, Transcript of trial court proceedings, p. 750, lines 17-26, Record of Supreme Court of Hawaii, p. 139, lines 17-26; Pet. App. 39A, lines 18-22, Transcript of trial court proceedings, p. 753, lines 15-19, Record of Supreme Court of Hawaii, p. 142, lines 15-19. At the last cited point there is a clerical error, in that "2%" should read "2½%." There is no 2% rate (App. 4-6). This was corrected when the written decision was entered).

The oral decision also approved (Pet. App. 40A, lines 1-8, Transcript of trial court proceedings, p. 754, Record of Supreme Court

The Supreme Court of Hawaii (R. 58-60, 89, 100, 113, 117) affirmed the trial court's findings and conclusions, after reviewing at length (R. 65-89, 100, 113) the evidence consisting in some 600 pages of testimony and 80 exhibits.

After adverting to the affirmance of the findings by the Supreme Court of Hawaii (cited to 40 Haw. 121 at p. 172, same as R. 113) the opinion of the Court of Appeals states:

> "While the appellants have challenged the findings in many respects, they have not brought up any of the evidence. In the circumstances, the presumption of correctness of the findings under Rule 52 (a) of the Federal Rules of Civil Procedure, applies with great strictness. *Richard v. Thompson,* 9 Cir., 1934, 72 F (2) 807, 809; *United States v. Van Dusen,* 8 Cir., 1935, 78 F (2) 121, 122; *Gallagher's Steakhouse v. Bowles,* 2 Cir., 1944, 142 F (2) 530, 531. However, in reality, the appellants are contending that it appears from the

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of Hawaii, p. 143) the numbered findings and conclusions, which previously had been proposed by the Tax Commissioner, and had been served and filed (App. 18-21).

After announcing its decision the trial court ordered the prevailing party to submit a form of written decision (Pet. App. 40A, Transcript of trial court proceedings, p. 754. Record of Supreme Court of Hawaii, p. 143). The form of written decision was brought on for hearing in the presence of counsel for both parties on January 28, 1952. It set forth the findings and conclusions, both those numbered and those unnumbered (R. 39, 40, 44-46, Pet. App. 44A, 44B, 49A-50A). It incorporated by reference (R. 39, Pet. App. 44A) the oral decision rendered at the conclusion of the trial, the transcript of which was filed with the written decision (Record of Supreme Court of Hawaii, pp. 131-144, Transcript of trial court proceedings of January 28, 1952).

The written decision was entered January 28, 1952. It appears in the printed record (R. 36-47), and constitutes the decision of the trial court (R. 58).

The proceedings were set forth by the Supreme Court of Hawaii in its opinion (R. 56. 57-58, infra pp. 36-37). In view of petitioners having in the Supreme Court of Hawaii waived (R. 61) their assignment of error number 1 which related to this (set forth in the record of the Supreme Court of Hawaii, p. 9) and no point in regard thereto having been included in the Statement of Points on Appeal in the Court of Appeals (R. 132, incorporating R. 125-129), these proceedings are not included in the printed record.

pleadings themselves that the tax to which they are subjected is a burden on interstate commerce and not within the power of the Territory of Hawaii to exact." (R. 138, Pet. App. 12A-13A.)

The petition (Pet. 4-5, 10, 34) attacks the statement by the Court of Appeals that the evidence was not before it. This attack is without foundation. The facts are that:

The Rules of the Court of Appeals require the printing of "all of the record which is material to the consideration of the appeal" (Rule 17 (6), C.A. 9, App. 8).

Petitioners obtained no dispensation from the printing requirement, but instead the Court of Appeals denied such dispensation (App. 16).

The petitioners designated none of the evidence for printing (App. 17).

Petitioners presented their case in the Court of Appeals on the theory that invalidity of the tax appeared from the mere fact that petitioners were engaged in radio broadcasting; petitioners attacked the materiality of the findings but not the evidence supporting them (developed below).

The petition (Pet. 4-5, 10, 34) refers to the stipulation made June 8, 1953 in the Supreme Court of Hawaii, printed at pages 4A-5A of the appendix to the petition. This stipulation provided for the transmission by the Supreme Court of Hawaii of the original papers. It took the place of Rule 75 (o) FRCP, and meshed with Rule 10 (1) of the Court of Appeals (App. 6-7). The Rules of the Supreme Court of Hawaii contained no provision for the transmission of original papers.[5]

It was provided by the stipulation that the original papers be sent to the Court of Appeals "as the record on appeal in said Court pursuant to the Federal Rules of Civil Procedure, the Rules of the United States Court of Appeals for the Ninth Circuit and the Rules of the Supreme Court of the

[5] The Rules of the Supreme Court of Hawaii during the period involved appear at 38 Haw. 676-690, 39 Haw. 695-710.

Territory of Hawaii." The stipulation thus incorporated by reference the printing requirements of Rule 75 (l) FRCP and Rule 17, C.A. 9 (App. 7-9).

Counsel for petitioners (Pet. 4-5, 10, 34) now seems to labor under the misapprehension that this stipulation (made in the Supreme Court of Hawaii and approved by its Chief Justice) conferred upon them dispensation from the printing requirements of Rule 17 of the Court of Appeals, and brought petitioners under Rule 10 (2) of the Court of Appeals (App. 7). Of course the Supreme Court of Hawaii could not and did not purport to so order. Nor did the parties purport to so stipulate.

When preparing the case in the Court of Appeals, petitioners' counsel labored under no misapprehension as to the printing requirements or the true purport of the stipulation. This is an afterthought.

Shortly after transmission of the record by the Supreme Court of Hawaii petitioners, appellants in the Court below, filed "Motion by Appellants to (1) To Consolidate this Appeal with Cause No. 12900, (2) To Dispense with Printing of the Record in this Appeal 13920" dated July 30, 1953 (App. 12). Respondent (appellee below) filed objections to this motion (App. 13-15). The Court denied the motion as to both parts (App. 16). "Appellants Designation of Record of Appeal" (App. 17) did not designate any of the evidence for printing.

It will be noted that petitioners' motion in the Court of Appeals for dispensation from the printing requirement stated that "the original papers can be examined and used in this appeal," but made no reference to the stipulation or to the import which it now is supposed to have. Nor did the motion offer to comply with, or state that petitioners had complied with, Rule 10 (2), C.A. 9 (App. 7) requiring that a party allowed to prosecute an appeal without printing shall furnish the original and three legible copies of the transcript in a prescribed format.

Petitioners' motion (App. 12) further stated that "The same territorial act is involved" (as in No. 12900, No. 480 in this Court), and that "the printing of the Record in the appeal would be unnecessarily burdensome and would serve no useful purpose." (App. 12). No. 12900 (No. 480 in this Court) had not reached trial. Petitioners sought to consolidate the two cases. This motion illustrates the theory of petitioners in the Court of Appeals that the evidence was immaterial.

Petitioners' brief in the Court below (R. 164, Supplemental Transcript of Record, not printed) makes no reference to the unprinted evidence and further illustrates the correctness of the statement by the Court of Appeals that "the appellants are contending that it appears from the pleadings themselves that the tax to which they are subjected is a burden on interstate commerce and not within the power of the Territory of Hawaii to exact."

Respondent, at page 9 of his brief in the Court below (R. 165, Supplemental Transcript of Record, not printed), stated that:

> "The trial court made findings of fact, as well as conclusions of law, the pertinent findings being set forth below. The Supreme Court held that the findings were supported by the evidence, which it reviewed (R. 65-89, 100, 113). Since the appellants have failed to include the evidence in the printed record, these findings of fact are not open to argument here. [Citing *Rickard v. Thompson*, 72 F. 2d 807 (C.A. 9th, 1934).]"

Petitioners made no reply, electing not to file a reply brief (R. 166, Supplemental Transcript of Record, not printed). This again illustrates that petitioners were not endeavoring to obtain review of the evidence in the Court of Appeals.

Petitioners' counsel now asserts (Pet. 34) that at the argument before the Court of Appeals it was "demonstrated" to the court that three bound legible copies of the transcript of testimony "were there before the Court." This is not the fact. Petitioners' counsel also asserts (Pet. 4-5) that the par-

ties stipulated that three legible bound copies of testimony be transmitted by the Supreme Court of Hawaii, for which statement petitioners' counsel cites the stipulation printed at pages 4A-5A of the appendix to the petition. Again, this is not the fact. The stipulation included a provision for transmission of "the transcript of evidence." Pursuant thereto, the Clerk of the Supreme Court transmitted the original transcript, as all counsel were advised (App. 10-11). There is nothing to suggest that the Clerk of the Supreme Court ever received more than the original transcript of testimony. The Clerk of the Circuit Court transmitted to the Supreme Court only the original (Record of Supreme Court of Hawaii, pp. 32i, 124, 126, 145-146). But whether or not there were furnished three copies of the transcript of testimony additional to the original would be material only in the event the Court of Appeals had dispensed with the printing requirement; its order denied such dispensation (App. 16).[6]

Since the Court of Appeals did not err in its holding that it was not called upon to review the evidence upon the record before it, the weight of the evidence is not material to the consideration of this petition. However, the overwhelming weight of evidence supporting the trial court's findings appears from the Supreme Court of Hawaii's review of the evidence (R. 58-60, 65-89, 100, 113, 117).

In essence, the trial court's findings were that broadcasts carried by short-wave relay were not taxed, and that KPOA's broadcasts on its standard band have commercial value only within and not outside the Territory. Thus the tax, measured by the gross income from the standard band broadcasts, impinged only on the broadcasts to the Hawaiian audience. The petition (Pet. 10-11) refers to "listeners" outside the Territory, on ships at sea or in places like Samoa, Alaska, or the continental United States distant more than

[6] The attention of the Court is directed to the contemptuous tone of the petition in No. 480 at p. 12, where the misstatements above noted are repeated.

2,000 miles from Hawaii. Such listeners have been referred to by the Supreme Court of Arkansas as "adventitious" listeners.[7] However, the petitioners are in error in asserting (Pet. 11) that the lower courts "blindly" followed the Arkansas case. The matter was covered by the evidence and findings, as now will be shown.

The petition relies on exhibits R-1 and R-2 (Pet. 10-11), described as being letters from "listeners" outside the Territory. These exhibits were included by the Supreme Court of Hawaii in its review of the evidence. In reference to these exhibits the Supreme Court of Hawaii said:

> " 'These distant listeners and this type of mail have no commercial value, * * *.
>
> " 'Mr. Fitkin, whose Station KHON broadcasts twenty-four hours a day on 1380 kilocycles, a frequency that is favorable for sky wave reception (Tr. 364, 365, 446, 562) testified that he received mail of the same type as Exhibits R and T, some of the letters stating that the station was coming in clearly. Mr. Fitkin stated that such letters from places outside the Territory have no sales value, and that out-of-the-Territory reception of standard band broadcasts of Hawaiian stations has no value to a sponsor (Tr. 560-563).
>
> " 'Mr. Mulrony, vice-president of the Advertising Publishing Company and co-licensee with the Advertising Publishing Company of Station KGU, the NBC affiliate in the Territory, who had been operating KGU for thirty years, testified on the basis of his thirty years experience in Hawaii in the radio broadcasting business that "we have never had a dollar beyond the Territory of Hawaii for coverage beyond the Territory" and that no radio audience outside Hawaii had been a factor in the selling and buying of radio time by KGU; that the possibilities of reception outside the

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[7] "* * * It is immaterial equally to the appellees and to their advertisers that a handful of non-residents may listen momentarily to the broadcast before turning to a program of greater interest. Such transient eavesdropping is merely an adventitious consequence of the uncontrollable carrying power of radio waves. * * *"
Beard v. Vinsonhaler, 215 Ark. 389, 391, 221 S.W. 2d 3, 4, appeal dismissed 338 U.S. 863, 896.

Hawaiian Islands had played no part in the competition for business; that he received listener mail of types of Exhibits R and T, some of the mail saying that the station was coming in clearly, and that such mail had no sales value (Tr. 581-585).

" 'Dudley Carroll, Jr., manager of the Honolulu branch office of N. W. Ayer & Co., a national advertising agency with offices in Boston, New York, Philadelphia, Chicago, Detroit, San Francisco and Hollywood, as well as Honolulu (Tr. 593-594), testified that in his experience no radio audience outside Hawaii was a factor in the buying of radio time on Hawaiian stations, that no presentation ever had been made to him by any Hawaiian station that his clients could reach outside of Hawaii on Hawaiian stations (Tr. 598).

" 'Jim Wahl, director of radio at the advertising agency of Holst, Cummings and Myers, with thirteen years' work in radio in Hawaii preceding his advertising agency work (Tr. 608, 609), testified that it was not the practice for an advertising agent to accept, as part of a Hawaiian station's coverage, listener mail of the type of Exhibits R and T coming from points outside the Territory and such mail "is not considered in the time we purchase"; that the radio audience outside Hawaii is not considered a factor in the buying of radio time on Hawaiian stations (Tr. 610, 611, 616)." (R. 85-86.)

It is difficult to understand the statement on page 7 of the petition that the Tax Commissioner solely and without any review decided what was "interstate" or "intrastate" revenue. The findings (R. 39, 40, 44-46), the review of the evidence by the Supreme Court of Hawaii (R. 58-60, 65-89, 100, 113, 117) and the opinion of the Court below (R. 143, Pet. App. 19A) show how this was decided. Perhaps the petition has reference to a concession made in the trial court that: "We either owe this tax, all of it or none of it. It is a question of law."[8]

[8] "MR. DAVIS: Your Honor, at this time, I do not mean to be presumptuous, but I take the position in this case, it might save some time. There is no dispute so far as I know with the figures in this

II. THE DECISION BELOW PROPERLY APPLIES THE DECISIONS OF THIS COURT, AND IS NOT IN CONFLICT WITH OTHER CIRCUITS OR WITH STATE COURTS.

A. Radio broadcasting consists in both intrastate and interstate commerce, hence there is an area for state taxation.

This proposition was foreshadowed in the case of *Fisher's Blend Station v. State Tax Commission,* 297 U.S. 650, 656, 1936, and confirmed when, in *Vinsonhaler v. Beard,* 338 U.S. 863, 1949, rehearing denied 338 U.S. 896, this Court dismissed for want of a substantial federal question, the appeal taken as a matter of statutory right from the state court decision in *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3.

Fisher's Blend Station v. State Tax Commission, supra, arose in a Washington State court, whence it reached the Supreme Court of Washington in 1935 (182 Wash. 163, 45 P. 2d 942) and this Court in 1936 (297 U.S. 650). It was argued by the State of Washington and erroneously held in the state supreme court, that the stations were merely furnishing local facilities and were unlike telegraph and telephone companies because they owned no facilities at point of reception. This Court ruled that radio transmission "in all essentials" is like transmission by telegraph or telephone (297 U.S. at p. 654), and rejected the State of Washington's argument, saying:

> "* * * Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, 'the ether,' is immaterial * * *." (297 U.S. at pp. 654-655.)

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case. We either owe this tax, all of it or none of it. It is a question of law. And before a liability can attach, in view of the pleadings in the case, where we say we owe none and her counterclaim, I think we have not denied the existence of the figures. It is just a matter of law, whether these facts are Inter-State Commerce. * * *" (Transcript of trial court proceedings, p. 580, not printed.)

The Court below followed this case when it said (Statement of the case, supra, pp. 6-8) that the principles applicable to radio broadcasting are those laid down for telephone and telegraph companies in the *Pacific Telephone and Telegraph Co.* case[9] decided at the same term of Court and in fact in the same month as this case. Petitioners reject this case when they argue that a radio station is different because it transmits through "the ether" (Pet. 4, 17, 20-21, 28).

Immediately following the above quoted statement that radio transmission is like transmission by telegraph or telephone, this Court went on to explain:

> "Similarly, we perceive no basis for the distinction urged by appellee, that appellant does not own or control the receiving mechanisms. The communications broadcasted are no less complete and effective, nor any the less effected by appellant, because it does not own or command the apparatus by which they are received. The essential purpose and indispensible effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Comm'n v. Nelson Bond & Mortgage Co.*, 289 U.S. 266, 279." (297 U.S. at p. 655.)

Petitioners italicize the word "all" in this quotation and present it out of context (Pet. 13, 14). But the fact remains that it was a holding upon the issue presented by the record. That issue was whether broadcasting to an out-of-state audience is intrastate commerce because the broadcasting company owns no facilities at point of reception. The answer is that this is not material, that radio broadcasting companies "in all essentials" are like telegraph and telephone companies.

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[9] 297 U.S. 403.

As noted by the Court below (R. 142-143; Pet. App. 18A) no attempt was made by the State of Washington to segregate the receipts derived from the in-the-state audience. The case went up on a stipulation that it be decided upon the facts alleged in the complaint,[10] among them:

> "That a Clear Channel station is assigned a radio frequency by the Federal Radio Commission which * * * is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States* * * *; that a Regional station is assigned a radio frequency band by the Federal Radio Commission for the effective transmission of radio broadcasting over the zone in which it is located and, therefore, is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the zone in which it is located* * * *."[11] (No. 628, Oct. 1935 term, R. 5.)
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> "That * * * Stations KOMO and KJR have been and now are engaged in *broadcasting commercially* in said manner * * *; that said broadcasting *has covered said designated areas* * * *, and that such broadcasting *has been continuous and effective* and * * * has furnished an effective and valuable medium of advertising * * *." (No. 628, Oct. 1935 term, R. 5-6.)
>
> "* * * that the gross income from the business * * * arises out of payments made by the National Broadcasting Company, Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, *who desire to reach the listening public in the areas and territories hereinabove described.*" (No. 628, Oct. 1935 term, R. 7.)
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> (Italics added.)

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[10] 297 U.S. at p. 651. Quotations that follow are from the complaint as set forth in the record in the case, No. 628, Supreme Court of the United States, October Term, 1935. The stipulation appears in the court's order printed at pp. 22-23 of that record.

[11] Under the regulations then in effect the United States was divided into five zones.

This Court, after reciting the substance of the foregoing facts which, as the Court noted, were stipulated, said that the business of the company was the transmission of advertising programs from its stations in Washington to listeners in other states.[12] (It is important to note that according to the stipulation both of the stations were designed for and produced commercial service over wide areas and all the advertisers desired to reach this widespread listening public.) Applying the principles of the telephone and telegraph company cases, the decision concluded that the tax then before it:

> "* * * is levied on gross receipts from appellant's entire operations, which include interstate commerce. As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail, *Cooney v. Mountain States Tel. & Tel. Co., supra;* cf. *Pacific Tel. & Tel. Co. v. Washington, supra,* * * *." (297 U.S. at p. 656.)

The Court below held that the facts in the present case call for a different result, upon application of the principles applicable in the telegraph and telephone company cases (R. 141-143; Pet. App. 16A-19A).

KPOA is a 5000 watt Class III-A station, on a Regional Channel, and as such according to the Federal Communications Commission Rules and Standards[13] is "designed to render service primarily to a metropolitan district and the

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[12] 297 U.S. at p. 654.

[13] It will be noted that in 1935, at the time of Fisher's Blend, a radio station was governed by rules that differ from the present ones. Under the present Rules and Standards of the Federal Communications Commission (R. 68; 47 C.F.R. part 3, subpart A and appendix beginning at p. 118 of 1949 ed.) the very best station, a Class I station, is designed to render service "over an extended area and at relatively long distances" (47 C.F.R. Sec. 3.22(a)) as compared with "the entire area of the United States," stipulated in 1935. Under the present Rules and Standards a regional station is designed to render service "primarily to a metropolitan district and the rural area contiguous thereto" (47 C.F.R. Sec. 3.22 (c)), as compared with an entire zone stipulated in 1935.

rural area contiguous thereto" (R. 68, quoting from Exs. 1 and 2; 47 C.F.R. Sec. 3.22 (c) and p. 120 of 47 C.F.R. 1949 ed.). KPOA is not engaged in broadcasting commercially outside the Territory, and time-buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience, according to the facts which this record presents (Supra, Point 1). The contrast could not be more complete.

In *Vinsonhaler v. Beard, supra,* this Court dismissed "for want of a substantial federal question," an appeal taken as a matter of statutory right from the decision of the Supreme Court of Arkansas in the case of *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3 (1949). This dismissal of the appeal was on the authority of *Crutcher v. Kentucky,* 141 U.S. 47, cited in *Vinsonhaler v. Beard,* 338 U.S. 863.[14] Rehearing was denied at 338 U.S. 896, despite a petition for rehearing that warned that citation of the *Crutcher* case would give the dismissal of the appeal great significance (pp. 5-6 of Petition for Rehearing in No. 342, October Term, 1949). The jurisdictional statement and petition for rehearing show that the contentions there made were the contentions presented here.

The Arkansas tax was a flat license fee of $250 upon "the business of intrastate radio broadcasting."[15] The Arkansas Supreme Court held that, leaving out of consideration the network programs brought in by telephone relay, at least the local programs were intrastate business, and that the $250 license fee levied on intrastate radio broadcasting

[14] The *Crutcher* case involved express companies and their agents. This Court did not say to what part of *Crutcher* it referred but it is worthy of note that in that case it said: "But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." (141 U.S. at p. 59.)

[15] 215 Ark. 389, 221 S.W. 2d 3. The ordinance alternatively levied the tax upon the generating of electro-magnetic waves for the purpose of radio broadcasting, but citation of the *Crutcher* case by this Court shows that the dismissal did not uphold the tax on this alternative ground. See note 14, supra.

thereby was sustained, citing *Postal Telegraph Co. v. Charleston,* 153 U.S. 692.

As a flat license fee, the Arkansas tax was more difficult to sustain than the present tax measured by gross income.[16] Yet this Court found no substantial federal question was presented.

The petition has only this to say about dismissal of the appeal in the *Vinsonhaler* case:

> "In Beard v. Vinsonhaler, 338 U.S. 863, where an appeal was dismissed, there was a *license tax* of only a few dollars involved. Obviously, there was no substantial federal question." (Pet. 22.)

This certainly does not show cogent reason for granting the writ. That this Court already has upheld a state tax upon the business of intrastate radio broadcasting cannot be denied. There is an area for state taxation. If there be doubt as to what that area is in the case of a flat license fee, certiorari in this case will not advance the solution. As to taxes measured by gross receipts, the principles are clear. And if there be doubt as to the application of a gross receipts tax in the case of a radio station so situated as to have broadcasts of commercial value both within and without the State, again we say certiorari in this case will not advance the solution. In the present case of a radio station so situated as to have broadcasts of commercial value only within and not without the Territory, the application of the governing principles is clear.

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[16] *City of Chicago v. Willett Co., supra,* 344 U.S. 574, 578. There have been three flat license fee radio station cases in the highest Court of Georgia, the first decided before *Fisher's Blend* and upholding the tax (*Atlanta v. Oglethorpe University,* 178 Ga. 379, 173 S.E. 110, mentioned in *Fisher's Blend* by way of comparison (297 U.S. at p. 656)), the second (*City of Atlanta v. Southern Broadcasting Company,* 184 Ga. 9, 190 S.E. 594) decided after *Fisher's Blend* and invalidating the tax on the inseparability ground (which in any event is inapplicable to a gross receipts tax), and the third, also decided after *Fisher's Blend,* holding the tax inapplicable upon the stipulated facts (*City of Atlanta v. Atlanta Journal Co.,* 186 Ga. 734, 198 S.E. 788).

Since *Fisher's Blend* the only gross receipts tax cases involving radio broadcasting have been the New Mexico cases. Both a three judge federal court in *Whitmore v. Bureau of Revenue*[17] and the Supreme Court of New Mexico[18] have viewed *Fisher's Blend* as having recognized that radio broadcasting consists in both intrastate and interstate commerce.

KVL v. State Tax Commission, 12 F. Supp. 497, on which petitioners rely (Pet. 13, 17, 20) likewise proceeded on the assumption that both intrastate and interstate business are involved in radio broadcasting. This was a gross receipts tax case decided on the non-separability doctrine which a few months later, in *Pacific Telephone and Telegraph*, was repudiated in so far as taxes measured by gross receipts are concerned. That decision, rendered in March, 1936,[19] immediately superseded the KVL decision rendered in October, 1935.[20] The statement that the *KVL* case was cited in *Fisher's Blend* (Pet. 17) is another misstatement by petitioners' counsel. *KVL* was cited in argument, which makes it significant that this Court did *not* cite it.

B. The business of effecting communications between points within the state may be, and by the Hawaiian statute is, taxed upon the proceeds thereof.

It repeatedly has been held that a state may impose upon telegraph and telephone companies an occupation or privilege tax measured by gross receipts, if confined to the receipts of the intrastate communications.[21] If not so confined the tax is invalid only to the extent that the receipts are de-

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[17] 64 F. Supp. 911, 916, affirmed on another point sub nom *Whitmore v. Ormsbee*, 329 U.S. 668, cited and quoted by the court below, R. 144, Pet. App. 20A.

[18] *Albuquerque Broadcasting Co. v. Bureau of Revenue*, 51 N.M. 332, 184 P. 2d 416, 421, 54 N.M. 133, 215 P. 2d 819. (A connected case in 54 N.M. 165, 216 P. 2d 698, involves only a procedural point.)

[19] 297 U.S. 403.

[20] 12 F. Supp. 497.

[21] *Pacific Tel. and Tel. Co. v. Tax Commission*, 297 U.S. 403, *Ratterman v. Western Union*, 127 U.S. 411; *Western Union Telegraph Co. v. Alabama State Board*, 132 U.S. 472.

rived from interstate communications.[22] The cases cited by petitioners exemplify the same principles.[23]

The tax here applies solely to the intrastate communication to the Hawaiian audience and impinges not at all upon interstate communications. This is true because gross receipts are the measure of the tax, and by that measure the tax is confined to and impinges only upon the business from which the taxed receipts arise.[24] The Court below so held (R. 143; Pet. App. 19A).

As to the provisions of the Hawaiian statute, it is sufficient to refer to Section 5455 (App. 4-6) which is the section of the law attacked in appellants' complaint (R. 5). This imposes a tax upon business in the Territory measured by the gross receipts thereof. It applies to sales, services, and in general all types of business. As applied to radio broadcasting (subsection D, App. 5) it was interpreted by the Supreme Court of Hawaii as follows:

> "The tax is upon the business of radio broadcasting 'within this Territory,' measured by the gross income of such business. This excludes broadcasts between points in the Territory and points outside the Territory. *Pacific Express Company v. Siebert*, 142 U.S. 339, 350.

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[22] *Ratterman v. Western Union, supra.*

[23] *Joseph v. Carter and Weekes Co.*, 330 U.S. 422 (Pet. 27, 30-31) was a case of a stevedoring company that loaded freight on steamers to which it was consigned with the object of effecting its delivery at out-of-state points. The case held, as is made clear by *Canton Railroad Co. v. Rogan*, 340 U.S. 511, 515, and *Western Maryland R. Co. v. Rogan*, 340 U.S. 520, 522, that cargo destined to an out-of-state point begins its interstate journey at the water's edge. Hence, the movement of the freight from the dock onto the vessel is part of the journey to the out-of-state point and cannot be taxed. In an attempt to apply this case petitioners (Pet. 31) misstate the Territory's position; the Territory does not seek to tax interstate communications.

Railway Express Agency v. Virginia, 347 U.S. 359 (Pet. 20) held that a tax, denominated a privilege tax and actually such, could not be applied to exclusively interstate business, the Court at the same time recognizing (347 U.S. at pp. 368-369) that a privilege tax could have been imposed had there been intrastate business as well.

[24] *Pacific Tel. and Tel. Co. v. Tax Commission, supra*, and other cases supra, note 21.

> "The tax commissioner has assessed the tax accordingly by excluding therefrom receipts of KPOA from short-wave relays being broadcast between points in the Territory and points outside the Territory and by including and thus subjecting to the tax only receipts of the station from its 'standard wave' broadcasts, which latter are of commercial value only within and not outside the Territory." (R. 117.)

The Court below regarded this interpretation as authoritative[25] (R. 143; Pet. App. 19A). The principle is one which is applicable to statutory interpretation by the Supreme Court of Hawaii.[26]

The petition presents only that radio broadcasting stands on a different footing. This is met elsewhere in the argument.

C. Intrastate business need not be conducted separately. The tax is valid since it does not in fact burden interstate commerce.

The same radio emanations which carry sound waves to homes within the Territory of Hawaii also pass beyond the Territory. The petition is replete with the argument that this circumstance defeats the Territory's tax. Two established rules eliminate this argument; they are set forth here and in Part D.

The *Pacific Telephone Co.* case, as interpreted in *City of Chicago v. Willett Co.* and followed in the Court below (R. 141-142, 145; Pet. App. 17A, 21A), held:

> "* * * that the tax, though directed at intrastate business only, in fact burdens interstate commerce * * * is for the taxpayer to show affirmatively * * *."
>
> "* * * the tax * * * was measured by a percentage of the gross income drawn solely from intrastate busi-

[25] The Court below cited *Osborne v. Florida*, 164 U.S. 650, 654, and *J. Bacon & Sons v. Martin*, 305 U.S. 380. See also *City of Chicago v. Willett Co.*, 341 U.S. 913 and 344 U.S. 574.

[26] *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383.

> ness. Although the taxpayer's intrastate and interstate activities were inseparable, the tax was not laid inseparably on both." (344 U.S. at p. 578.)

Since this tax is not laid inseparably upon intrastate and interstate business, it is for the taxpayer to show affirmatively a burden on interstate commerce, and there is no room for conjecture (Pet. 21) that the present two and one-half per cent tax might be raised to ten per cent. Likewise, if the petitioners' obligation to carry sustaining programs or other obligations (Pet. 12, 18-19, 22) rendered them incapable of meeting the tax that was for them to show affirmatively. Instead they seek to presume it.[27]

Such evidence as was produced as to KPOA's financial picture was produced by the respondent. It is reviewed by the Supreme Court of Hawaii at R. 66-67 and shows profits over and above the contested tax of more than $85,000 per year. In view of these profits, which are all from intrastate communication with the exception of negligible income (R. 87) from the untaxed short-wave relays, it is sufficient to quote the following from the *Pacific Tel. and Tel. Co.* case:

> "* * * The company's business, both the intrastate and the interstate, was conducted at a profit during the tax period. * * * Not only is the intrastate business (even with the addition of this tax) no burden; it is that branch of the business which makes it financially possible to carry on the interstate. * * *" (297 U.S. at p. 417.)

That the petitioners failed to show any burden on interstate commerce was found by the trial court (R. 40) and affirmed by the Supreme Court of Hawaii (R. 96-97, 100, 113-116, 117). The Court of Appeals concurred (R. 143-145; Pet. App. 19A-21A), and pointed out that the Arkansas

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[27] That petitioners' obligations of public service do not ipso facto confer upon them immunity from the territorial tax is shown in Part G, in answering the argument made in the petition that Congress has pre-empted the field.

court had rejected the non-separability argument and the appeal in that case was dismissed[28] (R. 146-147; Pet. App. 22A-23A).

It is difficult to understand the argument (Pet. 13, 16) that *Pacific Telephone and Telegraph Co.* came up on demurrer. That would not excuse these petitioners from meeting their burden of proof in the present case which went to trial. However, the fact is that all three cases decided at 297 U.S. 403 (herein referred to by the name of the first case) went to trial.[29]

D. Interstate commerce that is only incidental may be disregarded.

The standard band broadcasts, while producing sound waves that pass beyond the Territory, do not produce income from that circumstance. Incidental interstate aspects of a business may be disregarded. *Department of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 255, holding that where the tax was upon an intrastate enameling business the interstate trucking of the customers' stove and refrigerator parts was merely incidental. See also *Tad Screen Advertising v. Oklahoma Tax Commission*, 126 F. 2d 544 (C.A. 10) and note 30, infra.

Petitioners (Pet. 31) misstate the Territory's position when they say that the Territory seeks to ignore reception "whether far or near." The Territory only ignores the far reception that produces no receipts.

E. The "multiple burden" test has no significance where, as here, only intrastate communication is taxed.

Petitioners argue (Pet. 4, 15-16, 27, 30-31) that the possibility of a multiple burden on interstate commerce invalidates a state tax, and that this rule applies here. They rely on *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250.

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[28] *Vinsonhaler v. Beard*, supra, 338 U.S. 863, 896.

[29] See the opinions appealed from: 183 Wash. 33, 697, 698; 48 P. 2d 931, 938.

That case involved a gross receipts tax upon the advertising revenues enjoyed by the publisher of a magazine known as Western Live Stock. The magazine had an interstate circulation to an out-of-state reading public. The question was whether this interstate circulation of a magazine published in the state of New Mexico, the taxing state, was akin to interstate communication by radio broadcast stations. The court held that it was not comparable, and reiterated the rule that the business of broadcasting is comparable to the business of a telegraph or telephone company. Under the principles applicable to such companies and to KPOA, a tax may be imposed upon intrastate communications, to the audience within the state, measured by the receipts derived from broadcasting to the in-the-state audience. Such is the present tax.

Petitioners' argument assumes that the point of reception of the taxed broadcasting is in another state, then argues that if a tax were imposed at the point of reception there would be a multiple burden upon interstate commerce. The assumption is false and the argument accordingly invalid.

Another aspect of the *Western Live Stock* case[30] is the holding that the mere interstate transmission of advertising materials prepared by out-of-state advertisers has no significance in determining the taxability of the advertising revenues. This is an illustration of the rule that incidental interstate aspects of a business may be disregarded (Part D, supra).

F. The tax is not discriminatory.

This is not a case of a discriminatory tax directed against interstate commerce though in terms tied to a local incident. The territorial tax is of general application,[31] as held by the

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[30] 303 U.S. at pp. 253-254.

[31] Section 5455 (App. 4-6). The prevailing rate is the 2½% rate applicable here. Lower rates are allowed in certain categories (manufacturing, producing, wholesaling) where a resale and further tax will ensue.

trial court and the courts below (R. 40, 58-59, 100, 138; Pet. App. 13A).

Petitioners' argument of discrimination (Pet. 3-4, 27) asserts only that some stations may have broadcasting that is of commercial value outside the state and not taxable upon the receipts therefrom, while others have only taxable receipts. But this overlooks the obvious answer that the discrimination, if any, is in favor of interstate commerce, not against it.

G. The scope of the regulatory authority of the Federal Communications Commission is not the yardstick in this case. Tax exemption of all that Congress has regulated is not to be implied. Congress has not pre-empted the field to the exclusion of state taxing power.

Petitioners seek to apply as the yardstick for this case the scope of federal regulation (Pet. 3, 4, 9, 10, 11-12, 21-27, 28, 29-30, 33-34, 37-38). Under this argument, whatever Congress regulates ipso facto is immune from state taxation. The courts below rejected this argument (R. 94-96, 100-103, 105-107, 110-113, 143-144; Pet. App. 19A-21A). Its rejection is called for by the dismissal of the appeal in *Vinsonhaler v. Beard*[32] for want of a substantial federal question.

This Court repeatedly has stated that the demarcation between interstate and intrastate commerce from the standpoint of regulatory authority is not the same as from the standpoint of taxation. In *Kirschbaum Co. v. Walling*,[33] it was said:

> "* * * enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce. * * *"

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[32] 338 U.S. 863, rehearing denied 338 U.S. 896, pp. 24-25 supra.
[33] 316 U.S. 517, 521.

Conversely, in *Binderup v. Pathe Exchange,*[34] this Court said:

> "It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause."

By section 301 of the Communications Act of 1934 (47 U.S.C.A. 301, Pet. App. 2A),[35] Congress has exerted not only its regulatory power over interstate and foreign commerce but also its power over matters *affecting* interstate or foreign commerce. Moreover, Congress has exerted the power to govern the territories, which of course is not dependent on the transaction of interstate commerce; neither the existence of this power to govern the territories nor its actual exercise by Congress[36] implies exclusion of the territories from the field. Congress also has exercised its maritime powers, as shown by the reference in the act to "any vessel" but this indicates no pre-emptive intent.[37]

By contrast with section 301 setting forth the scope of the act, the definition of "interstate communication" (47 U.S. C.A. 153 (e), App. 1-2) is much narrower. By this definition interstate communication means communication from a state or territory to another state or territory. Thus, Congress has not purported to say that what it has regulated is all of it interstate communication.

Whether or not all that Congress has regulated could be exempted by it from state taxation, Congress has not done

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[34] 263 U.S. 291, 311.

[35] Section 301 of the Communications Act of 1934 (47 U.S.C.A. Sec. 301, Pet. App. 2A) includes in the scope of the act the transmission of energy or communications by radio:

From a state or territory to another state or territory.

From a state or territory to a foreign country or any vessel.

Within a state, whenever the effects of such use extend beyond the borders of the state or interference is caused thereby.

Within a territory, from one place in the territory to another place in the territory.

[36] *Puerto Rico v. Shell Co.,* 302 U.S. 253, 259.

[37] *Standard Dredging Co. v. Murphy,* 319 U.S. 306, 310.

so and the case falls within the rule that a congressional grant of immunity from state taxation will not be implied and exists only when granted in plain terms.[38]

That a radio station is not a federal instrumentality appears from this Court's decision that a radio station must qualify to do business under state laws,[39] that mere holding of a federal license does not convert the licensee into a federal instrumentality or confer tax immunity,[40] and that the same is true even though the federal government grants the privilege of operating in consideration of obligations of public service under federal supervision.[41]

Obligations of public service were involved in the case of *Williams v. Talladega*, 226 U.S. 404,[42] which concerned a telegraph company having, under Act of Congress, the privilege of using military and post roads of the United States, and by the same Act obligated to carry government messages at reduced rates and in priority to all other messages; this Court held that notwithstanding the company was subject to those duties of public service, it was subject to tax upon

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[38] *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 365-366.

[39] *Whitmore v. Ormsbee*, 329 U.S. 668, aff'g 64 F. Supp. 911, 916-917.

[40] *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 22, upholding a state license tax for the privilege of operating a warehouse licensed by the United States; *Broad River Power Co. v. Query*, 288 U.S. 178, 180, upholding a state tax on the production of electric power by a water power plant licensed by the United States.

[41] *Buckstaff Co. v. McKinley*, 308 U.S. 358 (1939), holds that a company operating a bath house situated on the United States government reservation known as Hot Springs National Park, and operated solely by virtue of a lease from the Secretary of the Interior, under which the United States government controlled the number of baths, the charges to the public, the qualifications of employees, the maintenance and care of the premises, and the manner in which patronage might be solicited, nevertheless was not an instrumentality of the United States within the meaning of a law exempting such instrumentalities from tax. The court cited *Federal Compress & Warehouse Co. v. McLean, supra.*

[42] See also *Postal Telegraph Co. v. Charleston*, 153 U.S. 692, upholding a city license tax on a telegraph company having, under Act of Congress, the privilege of using the post roads coupled with obligations of public service, and see other cases cited in the *Williams* case.

the transmission of private messages effected intrastate, though it could not be taxed upon its government business.[43] The point involved in *Williams v. Talladega, supra,* was clarified in relation to radio stations by the Act of January 26, 1942 (56 Stat. 18, c. 18), amending section 606 of the Communications Act of 1934, 47 U.S.C. Supp. 606 (App. 2-4).[44]

The pre-emption argument was rejected in *Braniff Airways v. Nebraska Board,* 347 U.S. 590, 594-597, even though the Civil Aeronautics Act of 1938 (49 U.S.C.A. 176(a)) declared the intention to exercise "exclusive national sovereignty." The Communications Act of 1934 (47 U.S.C.A. 151-609) contains no such declaration.

Petitioners insist that the United States owns "the ether" (Pet. 4, 17, 20-21, 28). Whether this is so or not has no bearing, since those using government property are taxable

[43] There is nothing in this case as to the taxation of government business. Therefore there is no occasion to inquire whether the holding in the Williams case as to implied tax immunity of government business is good law today.

[44] Section 606 is the section which provides in subsection (c) thereof, that in time of national emergency or disaster the President may take over the regulation of any radio station, or may close it, or may authorize the use of the station by any governmental department upon just compensation to the owners. By the Act of January 26, 1942 there was added subsection (g) (App. 3-4), which provides that nothing in the above cited subsection (c) "shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, * * *" The word "States" includes the territories, as provided in 47 U.S.C. Supp. 153(v) (App. 2).

The congressional committee reports show that this provision of the Act of January 26, 1942 was taken from Public Resolution No. 38, 65th Cong. (40 Stat. 904, c. 154), which authorized the President to supervise or take possession and control of telegraph, telephone, cable and radio systems during World War I; the Act of January 26, 1942 was deemed clarifying in nature (H.R. Rep. 1546, 77th Cong., 1st Sess.; Sen. Rep. 945, 77th Cong., 2d Sess.). It thus appears that Congress, instead of pre-empting the field to the exclusion of state and territorial taxation, in 1942 took steps to nail down the principle that radio broadcasting is the same as telegraph and telephone communication.

upon the business so done unless Congress enacts otherwise.[45] Ownership of the airways was discussed in *Braniff Airways, supra,* but that was in interpreting the declaration of "exclusive national sovereignty" made in the Civil Aeronautics Act.

National Broadcasting Company v. United States, 319 U.S. 190 (Pet. 17, 23-24), and *Dumont Laboratories v. Carroll,* 184 F. 2d 153 (C.A. 3rd) (Pet. 18, 21) are regulation cases, as are the remaining cases cited in the petition.

III. THE PETITION PRESENTS NO GROUNDS FOR CERTIORARI.

The "questions presented" numbered 1-10 (Pet. 2-4) also 12 (Pet. 5) have been met by the argument above presented, which shows that the tax has been confined to the broadcasting to the Hawaiian audience, that under well established principles it is valid when so confined, and that the Court of Appeals did not err in accepting the findings of the trial court affirmed by the Supreme Court of Hawaii.

The petition's "question" No. 11 (Pet. 5) is restated in the argument in two parts, 11 (a) and 11 (b) (Pet. 34-37). 11 (a) reiterates the attack made throughout the petition (Pet. 5, 8, 28, 35, 38) upon the procedure followed in the trial court in the rendering of the decision. That procedure, as stated in the opinion of the Supreme Court of Hawaii, was as follows:

> "At the outset of the trial the parties had submitted to the trial court memoranda of law and the trial court heard argument on January 14, 1952. On January 15, 1952, the trial judge, from the Bench, made pronouncements—since referred to as an 'oral decision'—wherein he expressed conclusions determinative of the case in

[45] *Wilson v. Cook,* 327 U.S. 474, upholding a state privilege tax upon persons severing timber from the national forest reserves under contract with the government; see also *Williams v. Talladega,* supra, 226 U.S. 404, involving a telegraph company having under R.S. 5263-5264 the right to use the public domain.

favor of the tax commissioner and against the Complainants." (R. 56.)

"Findings and conclusions proposed by the Tax Commissioner, which had been served and filed on January 11, 1952, were, at the conclusion of the trial, to wit, in pronouncements from the Bench on January 15, 1952, approved by the trial court, and the submission of a written decision by the prevailing party was directed. Following a hearing upon the form of decision, a written decision was entered and filed on January 28, 1952. It incorporated by reference the prior pronouncements by the trial judge, or so-called 'oral decision,' and set forth the findings and conclusions that had been requested and approved, together with other findings and conclusions announced from the Bench." (R. 57-58.)

Petitioners' attack upon this procedure has been covered at page 12 and in note 4, supra. As there stated, in the Supreme Court of Hawaii petitioners waived the error which they had assigned in this regard and in the Court of Appeals did not include it in the Statement of Points on Appeal. In view of this, no further argument is presented at this point.

11 (b) argues (Pet. 7-8, 35-37) against the penalties added to the tax for delinquency in payment. Much of this argument has to do with the companion case, No. 12900 in the Court below (No. 480 in this Court), and accordingly is there answered.

In the Supreme Court of Hawaii the delinquency penalties and interest were the subject of assignment of error 33 (set forth in the record of the Supreme Court of Hawaii p. 16). This assignment of error was waived (R. 61, 117). No point in regard thereto was included in the Statement of Points on Appeal in the Court of Appeals (R. 132, incorporating R. 125-129). In view of this we deem it sufficient to quote from the opinion of the Supreme Court of Hawaii:

"Although, as we have said, supra, the complainants' assignment of error number 33 has been waived by the

non-inclusion thereof in their specifications of error—and, also, their failure to present either argument or authorities pertinent thereto—but, nevertheless, to avoid any possible uncertainty which might arise because of our failure to consider whether interest and penalties should be added to a delinquent tax, we declare that the rule of law is that interest and penalty shall be added to a tax lawfully payable, whenever there has been failure to pay such tax when due, and same has become delinquent, the interest and penalty automatically following the former pursuant to statutory provisions. Section 5463, Revised Laws of Hawaii 1945, as amended by Act 253 of the Session Laws of Hawaii 1945.

"Further, there is a well-established rule that where a tax law provides for penalties and interest, one who contests the tax does so in peril of the penalties and interest, and is liable for penalties and interest upon such amount unpaid as is found to be legally due.

"See Spencer v. Babylon R. R. Co., 250 Fed. 24 (C.A. 2d), a case arising in New York; Washington Water Power Co. v. Kootenai County, 270 Fed. 369, as modified 273 Fed. 524 (C.A. 9th), a case arising in Idaho; State of California v. Hisey, 84 F. 2d 802, 805 (C.A. 9th); State v. Holly Sugar Corp., 57 Wyo. 272, 116 P. 2d 847; State v. Great Atlantic and Pacific Tea Co., 190 La. 925, 183 So. 219, cert. denied 305 U.S. 637; Citizens' Waterworks v. Hughes, 362 Ill. 136, 199 N.E. 265, and People ex rel Stuckart v. Chicago etc. Ry. Co., 270 Ill. 477, 110 N.E. 720; Brittain & Henry v. Robertson, 120 Miss. 684, 83 So. 4, and Hamel v. Marlow, 171 Miss. 559, 157 So. 905; Rixeys Executors v. Commonwealth, 125 Va. 337, 99 S.E. 573, 101 S.E. 404; Power v. City of Detroit, 139 Mich. 30, 192 N.W. 288; Western Union Tel. Co. v. State, 64 N.H. 265, 9 Atl. 547, and Winnipiseogee Lake Mfg. Co. v. Gilford, 64 N.H. 514, 15 Atl. 137; Cedar Rapids & M.R. Co. v. Carroll County, 41 Iowa 153, 191; Jaggar v. David, 121 Kan. 737, 250 Pac. 260." (R. 117-119.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RHODA V. LEWIS,
Deputy Attorney General of Hawaii
Counsel for Respondent.

January 7, 1955.

APPENDIX

47 U.S.C. 153, subsections (a)-(g), (k) and (v), being a portion of section 3 of the Communications Act of 1934, 48 Stat. 1065, as amended 50 Stat. 189, 60 Stat. 1352.

§ 153. Definitions.

For the purposes of this chapter, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this chapter.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(e) "Interstate communication" or "interstate transmis-

sion" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire communication between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(f) "Foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

(g) "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone.

* * *

(k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

* * *

(v) "State" includes the District of Columbia and the Territories and possessions.

* * *

47 U.S.C. 606, subsections (c), (d) and (f), being a portion of section 606 of the Communications Act of 1934, 48 Stat. 1104, as amended 56 Stat. 18, 56 Stat. 1096, 61 Stat. 449.

§ 606. War powers of President.

* * *

(c) Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.

(d) Upon proclamation by the President that there exists a state or threat of war involving the United States, the President, if he deems it necessary in the interest of the national security and defense, may, during a period ending not later than six months after the termination of such state or threat of war and not later than such earlier date as the Congress by concurrent resolution may designate, (1) suspend or amend the rules and regulations applicable to any or all facilities or stations for wire communication within the jurisdiction of the United States as prescribed by the Commission, (2) cause the closing of any facility or station for wire communication and the removal therefrom of its apparatus and equipment, or (3) authorize the use or control of any such facility or station and its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.

* * *

(f) Nothing in subsection (c) or (d) shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws,

powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by any communication system or systems.

* * *

Section 5455, Revised Laws of Hawaii 1945, as amended by Acts 100 and 253, Session Laws of Hawaii 1945, and Acts 111 and 113 of the Session Laws of Hawaii 1947.

Sec. 5455. Imposition of tax. There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

A. Tax on manufacturers. (1) Upon every person engaging or continuing within this Territory in the business of manufacturing, compounding, canning, preserving, packing, milling, processing, refining or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles, substances, or commodities, manufactured, compounded, canned, preserved, packed, milled, processed, refined or prepared, for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), multiplied by the respective rates as follows:

Millers or processors of sugar, raw or refined, two and one-half per cent; canneries, two and one-half per cent; all manufacturers on whose gross income a tax is not otherwise levied in this chapter, one and one-half per cent.

[Pars. (2)-(6) relating to manufacturers, omitted.]

B. Tax on business of selling tangible personal property; producing. (1) Upon every person engaging or continuing within this Territory in the business of selling any tangible personal property whatsoever (not including, however, bonds or other evidence of indebtedness, or stocks), there is likewise hereby levied, and shall be assessed and collected, a tax equivalent to two and one-half per cent of the gross proceeds of sales of business; *provided,* however, that in the case of a wholesaler, the tax shall be equal to one per cent of the gross proceeds of sales of the business, and in the case of a producer, the tax shall be equal to one and one-half per cent of the gross proceeds of sales of the business.

[Pars. (2)-(6), relating to selling and manufacturing, omitted.]

C. Tax upon contractors. (1) Upon every person engaging or continuing within this Territory in the business of contracting, the tax shall be equal to two and one-half per cent of the gross income of the business. *Provided,* however, that the rate of tax levied upon any such person measured by gross income received on account of uncompleted contracts, entered into prior to the effective date of this chapter, shall be eight-tenths of one per cent. All contracts shall be prima facie presumed to have been entered into subsequent to the effective date of this chapter.

[Pars. (2) and (3), relating to contracting, omitted.]

D. Tax upon theaters, amusements, radio broadcasting stations, etc. Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business.

D-1. Tax upon sales representatives, etc. Upon every person classified as a representative or purchasing agent by chapter 98.01, engaging or continuing within this Territory in the business of performing services for another, other than as an employee, there is likewise hereby levied and shall be assessed and collected a tax equal to two and one-half per cent of the commissions and other compensation attributable to the services so rendered by him.

E. Tax on service business. Upon every person engaging or continuing within this Territory in any service business or calling not otherwise specifically taxed under this chapter, there is likewise hereby levied and shall be assessed and collected a tax equal to two and one-half per cent of the gross income of any such business.

F. Professions. Upon every person engaging or continuing within this Territory in the practice of a profession, including those expounding the religious doctrines of any church, there is likewise hereby levied and shall be assessed and collected a tax equal to two and one-half per cent of the gross income of such practice or exposition.

G. Tax on other business. Upon every person engaging or continuing within this Territory in any business, trade, activity, occupation, or calling not included in the preceding subsections or any other provisions of this chapter, there is likewise hereby levied and shall be assessed and collected, a tax equal to two and one-half per cent of the gross income thereof. This subsection shall apply to the gross income of persons taxable under other subsections hereof not derived from the exercise of privileges taxable thereunder.

Rule 10, Court of Appeals for the Ninth Circuit, being the same as the former Rule 11.

APPEALS, RETURN AND RECORD

1. In all cases on appeal or review, civil or criminal, the clerk of the trial court or commission shall transmit to the

clerk of this court the original files designated by the respective parties as the record on appeal or review.

2. In cases prosecuted in forma pauperis, or when the appellant* is permitted to prosecute his appeal on a typewritten transcript, the record to be furnished to the clerk of this court shall be in typewritten form, upon paper 8 inches by 10½ inches, and bound on the left margin. In addition to the certified original, three identical *clearly legible and unblurred* copies must be transmitted to this court.

* Whenever the word "appellant" is used in these rules it includes "petitioner" and the word "appellee" includes "respondent."

Rule 17, Court of Appeals for the Ninth Circuit, being the same as the former Rule 19.

PRINTING RECORDS

1. Records shall be printed under the supervision of the clerk of this court. Each party shall pay the estimated expense of printing the portions of the record he designates. The clerk is charged with the duty of having the printing done at reasonable rates, and he shall promptly cause an estimate to be made of the expense of printing the record and his fee for preparing it for the printer and supervising the printing, and shall notify the parties in the case of the amount of the estimate of the portions of the record designated by each party, which amounts must be paid within ten days. If the estimated expense is not paid as provided in this rule, it shall be the duty of the clerk to report that fact to the court, and if the appellant is in default the cause will be dismissed unless good cause to the contrary is shown. In such instance, the clerk shall notify the counsel for the defaulting party of the date on which the matter will be presented to the court. In cases appealed from the District Courts of Alaska, Hawaii and Guam, and the Supreme Court of the Territory of Hawaii, the clerk of this court

shall fix the time for payment of deposit for printing the transcript.

2. Upon payment of the amount estimated by the clerk, 60 copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

3. In all cases, the clerk of this court shall prepare the record for the printer, index the same, supervise the printing, and distribute the printed copies to the judges and one or more printed copies to the counsel for the respective parties.

4. If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate, the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record and the clerk's fee shall be taxed against the party against whom costs are given.

6. In all cases, including those on petition for review to enforce or to set aside an order of a United States Board or Commission, the appellant or petitioner, upon the filing of the record in this court, shall file with the clerk a concise statement of the points on which he intends to rely. With such statement the appellant or petitioner shall file a designation of all of the record which is material to the consideration of the appeal or review and forthwith serve on the adverse party a copy of the statement and designation. The adverse party, within 10 days thereafter, may designate in writing filed with the clerk, additional parts of the record which he thinks material; and if he shall not do so, he shall be held to have consented to a hearing on the parts designated. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated

by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the points so stated. If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record as well as the documents to be printed or omitted.

7. At the time of filing the record and docketing the cause, counsel for the appellant in patent cases may furnish the clerk with copies of Patent Office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient use, shall be used in printing the record.

8. In all cases prosecuted to this court in which records or other matter shall be printed under the supervision of the clerk of this court, his fee for preparing the same for the printer, supervising the printing, indexing and distributing the copies shall be 25 cents for each printed page of the record and index provided that the fee for any single record and index shall not exceed $250.00.

OFFICE OF THE CLERK
SUPREME COURT, TERRITORY OF HAWAII
HONOLULU

GUS K. SPROAT
MRS. LEOTI V. KRONE
CLERKS

July 14, 1953

Hon. Paul P. O'Brien
Clerk, U. S. Court of Appeals for the Ninth Circuit
San Francisco, California

RE: J. Elroy McCaw and John D. Keating, plaintiffs-plaintiffs in error v. The Tax Commissioner of the Territory of Hawaii, Earl W. Fase, defendant-defendant in error, L. 21340, Supreme Court No. 2898

Dear Mr. O'Brien:

We are depositing in the mail today our ORIGINAL files, consisting of two volumes, original transcripts of evidence, and exhibits in the above-entitled cause, pursuant to the stipulation between counsel and approved by Chief Justice Towse on June 8, 1953.

As you will note, our files contain an index of the documents contained in each. You will also note the folders containing the exhibits and transcripts are numbered and their contents noted on the flap of the envelope-folder, as follows:

Folder No. 1 contains Plaintiffs' Exhibits A-1 to Q, inclusive;

Folder No. 2 contains Plaintiffs' Exhibits R-1 to V-2, inclusive;

Folder No. 3 contains Defendant's Exhibits 1 to 12, inclusive;

Folder No. 4 contains Defendant's Exhibits 13 to 18, inclusive;

Folder No. 5 contains Defendant's Exhibits 19 to 29, inclusive;

Folder No. 6 includes Defendant's Exhibits 30 to 60-b, inclusive;

Folder No. 7 contains Volumes I to IV, inclusive, of original transcripts of evidence No. 1182;

Folder No. 8 contains Volumes V to 11, inclusive, of original transcripts of evidence No. 1182 and one small transcript numbered 1181.

This original record is going forward to you by registered air mail, return receipt requested by air, and special delivery.

When this case has been determined by your court, please return the above files and records to us as soon as possible, notifying us when you have done so.

We are transmitting to you herein Mr. Ingman's check for $25, to cover the docket fee in this case.

Thank you for your courtesies and consideration in these matters.

Very truly yours,

(Mrs.) Leoti V. Krone
Dep. Chief Clerk Supreme Court

encl.
cc: D. N. Ingman
Kenneth Davis
Rhoda V. Lewis, Dep. Atty. Gen.

(R. 150, Supplemental Transcript of Record, not printed)

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

J. Elroy McCaw and John D. Keating, *Appellants,* vs. The Tax Commissioner of the Territory of Hawaii, Earl W. Fase, *Appellee.*	No. 13920 UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

MOTION by APPELLANTS to

(1) To Consolidate this Appeal with Cause number 12900.

(2) To Dispense with the Printing of the Record in this Appeal, 13920.

APPELLANTS respectfully move this Court for an ORDER (1) permitting the consolidation of this appeal with No. 12900, which was continued by stipulation pending the appeal of this case, and FURTHER, for an ORDER

(2) permitting the Appellants to dispense with the printing of the Record in this appeal, No. 13920, on the grounds that the same Territorial Act is involved, and since the Original papers can be examined and used in this appeal, the printing of the Record in this appeal would be unnecessarily burdensome and would serve no useful purpose. Especially is this so, since the Points on Appeal would be included in the printed briefs.

Kenneth Davis and David N. Ingman
Attorneys for the Appellants.
By /s/ Kenneth Davis

(R. 151, Supplemental Transcript, not printed)

No. 13920

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

J. ELROY MCCAW AND JOHN D. KEATING, *Appellants,* vs. THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, EARL W. FASE, *Appellee.*	UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

APPELLEE'S OBJECTIONS TO APPELLANTS' MOTION OF JULY 30, 1953.

Comes now EARL W. FASE, Tax Commissioner of the Territory of Hawaii, appellee herein, by Rhoda V. Lewis, Deputy Attorney General of the Territory of Hawaii, and hereby (A) objects to the granting of appellants' motion to dispense with the printing of the record in No. 13920, and (B) takes the position that the consolidation of No. 13920 with No. 12900 is premature and in any event should only be a consolidation *for argument*. In support of said objections appellee presents:

1. That appellants' motion to dispense with the printing of the record in No. 13920 fails to set forth any valid grounds for the granting thereof.

2. That as appears from the record in No. 12900:

(a) No. 12900 was appealed from the United States District Court, where it was dismissed without prejudice at the threshold of the case for the reason that the case belonged in the territorial courts. There was no trial of No. 12900 in

the United States District Court, and the court did not reach or decide any of the motions for summary judgment. (No. 12900, R. 159-160, 466-471.)

(b) On August 18, 1952 No. 12900 was duly set for argument on October 3, 1952 (Clerk's notice dated August 18, 1952), whereupon by a stipulation approved and filed on or about September 16, 1952, the parties stipulated that No. 12900 "be taken off the calendar and continued on the docket of this Court without being reassigned for hearing, until disposition in the courts of the Territory of Hawaii of the similar litigation there pending and now in the Supreme Court of Hawaii as Supreme Court No. 2898, and until the perfecting of an appeal therefrom and completion of briefs in such appeal in this Court, or alternatively until the expiration of the time for such appeal and briefs."

(c) In appellee's brief in No. 12900 in this court, filed April 10, 1952, appellee had argued that the District Court rightly dismissed the case, that in any event No. 12900 involves only the question whether the case should have been dismissed or should have been held in the District Court awaiting the outcome of litigation in the territorial courts, and that No. 12900 could not resolve the merits of the litigation (No. 12900, Br. for appellee, pp. 2, 32). Appellee had suggested in said brief that disposition of No. 12900 might be deferred pending final disposition of the similar litigation in the territorial courts (No. 12900, Br. for appellee, pp. 2-3, 33).

(d) The litigation in the territorial courts, referred to in said brief and in the stipulation which followed, was and is a case instituted by appellants in the Circuit Court of the Territory and there tried, resulting in findings of facts and a decision on the merits in favor of appellee, thence taken to the Supreme Court of Hawaii by writ of error and there affirmed, and now docketed in this Court as No. 13920, the above entitled cause.

3. That by the stipulation filed September 16, 1952 in No. 12900 appellants in effect elected to bring before the Court the record in No. 13920 before pressing for a decision on the merits. By its motion to dispense with printing of the record in No. 13920 appellants in effect now elect not to bring before the Court the record in No. 13920 and to rely solely on No. 12900. The only appropriate motion in the circumstances would have been one to dismiss the appeal in No. 13920, for no grounds are shown for granting of the motion to dispense with printing of the record in No. 13920.

4. That appellee has no objection to consolidation of No. 13920 with No. 12900 at the proper time, which will be after the printing of the record in No. 13920 and the completion of the briefs in No. 13920. Consolidation of the two cases is premature at this time. In any event, the consolidation should only be *for argument*. By the stipulation filed in No. 12900 on or about September 16, 1952, it was agreed that No. 13920 (described as the appeal from Supreme Court No. 2898) would be separately briefed, and appellants' motion indicates that appellants so understand the matter.

Dated at Honolulu, T. H., August 4, 1953.

EARL W. FASE, Tax Commissioner
of the Territory of Hawaii, Appellee
By /s/ Rhoda V. Lewis
Deputy Attorney General

(R. 153, Supplemental Transcript of Record, not printed)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of

Wednesday, August 12, 1954.

Before: HEALY and ORR, Circuit Judges.

No. 13920

ORDER DENYING MOTION

ORDERED motion of appellants to consolidate appeal in the above cause with cause No. 12900, and to dispense with the printing of the transcript of record in case No. 13920, denied.

(R. 158, Supplemental Transcript of Record, not printed)

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

J. ELROY MCCAW AND JOHN D. KEATING, *Appellants,* vs. THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, EARL W. FASE, *Appellee.*	No. 13920 UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

APPELLANTS' DESIGNATION OF RECORD OF APPEAL

Appellants designate that the following portions of the record be prepared for the printed transcript of record on appeal, unless the Court dispenses with the same, on motion duly made therefor:

1. Amended Complaint
2. Answer and Cross-Complaint
3. Replication
4. Decision of the Circuit Court
5. Opinion of the Supreme Court of Hawaii
6. Statement of Points, filed June 8th, 1953, and now adopted by Appellants as their Points of Appeal in the case in this Court, Numbered 1 to 23 inclusive.

Dated this 30th day of July, 1953.

Kenneth Davis AND David N. Ingman
Attorneys for Appellants.
By /s/ Kenneth Davis

(R. 159, Supplemental Transcript of Record, not printed)

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

AT TERM — IN LAW

J. ELROY MCCAW AND JOHN D. KEATING,
Complainants,

v.

THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY,
Defendant.

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST

PROPOSED FINDINGS AND CONCLUSIONS SUBMITTED BY THE TAX COMMISSIONER

/s/ Jan 11, 1952
Rcpt acknowledged
David N. Ingman

(stamped) Filed
At 11:00 o'Clock AM
Jan 11, 1952

/s/ J. V. Lee
Clerk

RHODA V. LEWIS
Deputy Attorney General
Territory of Hawaii
Attorney for Defendant.

Law No. 21340

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT,
TERRITORY OF HAWAII

AT TERM IN LAW

J. ELROY MCCAW AND JOHN D. KEATING,
Complainants,
v.
THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY,
Defendant.

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST

PROPOSED FINDINGS AND CONCLUSIONS SUBMITTED BY THE TAX COMMISSIONER

1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage.

2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the Territory audience.

3. Where a KPOA broadcast is directed to an out-of-the Territory audience a shortwave relay is used, as in the case of the program "Hawaii Calls."

4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by shortwave relay or brought into the Territory by shortwave relay.

5. During daylight hours enjoyable listening to KPOA's standard band broadcasts is impossible at places outside the Territory, and is limited to ships or planes that happen to be within range.

6. During hours of darkness reception of KPOA's standard band broadcasts outside the Territory is too unreliable and irregular for such reception to have commercial value.

7. KPOA has a "foreign language department" which is offered by it as a service to advertisers. This department conducts, each broadcast day, a substantial number of hours of broadcasts in Japanese and in a Filipino dialect. These broadcasts are scheduled by the station each day on a participating basis, that is, the station puts on the foreign language programs and sponsors buy spot announcements on the programs.

8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

9. The radio audience outside the Territory of Hawaii is not a factor in the selling or buying of radio time on station KPOA, where no shortwave relay is employed.

10. The sale of radio time to Willie Saaga, shown by plaintiffs' Exhibit L, is an exceptional instance, and the Tax Commissioner was not obliged to take notice of this exceptional instance unless it was called to his attention. Before the tax assessments were made KPOA was given an opportunity to make such showing but did not do so and is not now entitled to a deduction for this sale.

11. The territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the tax law and assessments made thereunder are valid.

12. The plaintiffs are not entitled to recover the taxes paid under protest and the Tax Commissioner is entitled to judgment on his counterclaim.

DATED at Honolulu, T. H., this 11th day of January, 1952.

Respectfully submitted,

/s/ Rhoda V. Lewis
Deputy Attorney General
Attorney for the Tax Commissioner
Defendant.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

/s/ W. C. Ing
Clerk, Circuit Court, First Circuit,
Territory of Hawaii.

(Record of Supreme Court of Hawaii, pp. 127-130.)